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H I S T O R Y
A N D
P R A C T I C E
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By the late Lord Chief Baron GILBERT.

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P R E F A C E.

TH A T the name of G I L-
B E R T is a sufficient re-
commendation of itself, is evident
from the success the treatises al-
ready published under that sanc-
tion have met with from the
public.

We therefore beg leave to assure
our readers, that the following
sheets are the genuine performance
of that learned author. The sub-
ject matter concerns the practice
and theory of the high court of
Chancery, than which, what can
be more useful to the profession?
and tho' merit, which deservedly
claims the title of authority, is too
conspicuous in this performance to
be here particularly pointed out,
yet our author seldom relies on his

P R E F A C E.

own opinion, but supports it with the best authorities, as will evidently appear to every judicious reader.

The references are carefully compared with the books themselves, and many added to books published since the author wrote, and other useful additions; and to do the author all the justice in our power, this edition has been carefully revised and corrected, and a complete table added to the whole; and we doubt not the public will esteem it an useful and valuable addition to the several pieces already collected and published of the same author.

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Forum Romanum.

C H A P. I.

Of the original of the court of Chancery.

TO consider the division of the Division of the courts of justice, we must see how courts of jus- they stood immediately before such tice. divisions were made; and from the time of the *Saxons* till the reign of *Edward* the first, the several county courts and sheriffs courts did decline in their interest and authority. Decline of the The methods by which they were broken county courts, were two-fold. &c.

First, by granting commissions to the sheriffs By granting by writ of justices; whereby the sheriff had justices to the a particular jurisdiction granted him to be sheriffs. judge of a particular cause independent of the suitors of the county court, and these commissions were after the *Norman* form, by which all power of judicature was immediately derived from the prince; these commissions were necessary to give the sheriff a jurisdiction above the value of forty shillings.

The second way whereby the county courts By making ju- were broken, was by appointing the justices stices in Eyre. in *Eyre*; * these were appointed in the twenty-

* Ancient dialogue concerning the Exchequer, p. 30. b. printed in 1758.

When appointed.

second year of *Henry* the second, and were judges that sat in the several counties to hear and determine causes, as well criminal as civil; and these proceeded in the same method of judicature as was observed in the King's courts, and kept an uniformity in the law, which was very much broken by the distinct courts of justice, that before had transacted all civil business in their several counties; from hence, afterwards they began to grant commissions to take assizes, which were commissions * *pro re nata* upon complaints of disseisins done in their several counties.

What the King's court consisted of.

The King's own court consisted of the justicier, who was the chief officer of state, and the chancellor, † or keeper of the seal, and such other barons and tenants § *in capite*, as the king called to their assistance; these were called by writ to the determination of particular causes, and tho' towards the latter end of the first *Norman* period, there were some great officers of state that were constantly resident, yet the King, according to the weight of the cause, called sometimes more and sometimes less in number; and by vertue of such writs they sat and transacted all civil business. This court of the King transacted all civil and criminal pleas, as likewise the matters relating to the revenue; these, when they sat as a court of revenue, resided in the Exchequer; when they sat on criminal and civil causes, they sat in the hall of the king; || when they sat in the Exchequer the treasurer generally

* According to the exigency of the matter.

† Ancient dial. concerning Exch. p. 9. b. § In chief.

|| Ancient dial. p. 4. &c.

presided

presided as a man best skilled in the revenue; when they sat as a court criminal or civil, the justicier presided as a man best skilled in the law; when it was a matter of great moment, as upon levying a new war, or raising an Escuage, most of the great persons that held * *in capite* were called, and here they transacted all manner of business, as well criminal as civil, relating to the revenue; and this was called the *Commune concilium Regni*, or The Parliament; and to this court afterwards the representatives of boroughs that held * *in capite* were called; this was the great court baron of the kingdom; and when they sat, all less courts and councils seemed to be superseded; but these were seldom called during the first *Norman* period, because such concourse was formidable to those princes; but less councils to transact the public business were very frequent amongst them; all the pleas that were depending in the courts of the King, or of the exchequer, were put before them, save only the inquest of offices that were not traversed, and the common estreats upon which process went, were not brought before them, because these being matter of course, remained as before in the exchequer.

In the barons wars, the power of *Hugo de Burgo*, who was the justicier, was turned against the King, and it was found likewise, that the barons who had great districts were very troublesome to the crown; for tho' in the conqueror's time, and for some reigns after the conquest, they were kept in very good

The barons
very trouble-
some.

* In chief.

subjection, and the *Norman* and *English* barons were a balance one for the other, the *Normans* being dependants upon the crown who had now planted them in the kingdom: but afterwards time wearing away the distinction, the *Normans* grew up *English*, and became fond of those liberties and privileges that the *English* had enjoyed in the *Saxon* times; and from hence grew the barons wars, which introduced a new police in the kingdom, which hath continued with some alteration unto this day; and for this purpose after the battle of *Evesham*, in the time of *Henry* the third, there seem to be some of the wisest policies set on foot that have ever been known in any nation; for first, after the conquest, the King confirmed the

Great charter confirmed.

Great charter, which made him very popular, by making so good an use of his conquest as not to grasp at the liberties of the people.

The distinction between the barones majores and the barones minores.

The next step that was taken, was that of forming a balance with the great peers, by breaking the territories that were escheated into smaller districts, to hold immediately from the crown; from hence came the distinction between the * *barones majores*, and the † *barones minores*; the * *barones majores* were those that had the greater districts, and the † *barones minores* were the new tenants § *in capite*, that had the smaller territories; and because the number of the † *barones minores* was too great to be called together at the assembly and convention of the states; they took a new method to balance their power with that of the ancient baronage.

* Greater barons.

† Less barons.

§ In chief.

Such

Such ports and boroughs as had held * *per baroniam*, were antiently summoned to parliament and sent their representatives to sit with the baronage, because they were equally concerned in the taxes and levies of the kingdom, with the rest of the § *barones minores*, holding then about as large a quantity of land in the county as amounted to a barony. They likewise sent their representatives both of counties and boroughs, which, as some have said, were digested into one house; but I believe they were originally formed into two, as they are at present; from hence the writ is, that they should chuse † *duos milites gladiis cinctos*; and from hence afterwards the taxes and levies were given in the lower house, because the ports and boroughs were trading parts of the kingdom, and the barons of those ports settled the several customs and taxes that were raised to the use of the navy; and as the barons that held § *in capite* to accompany the King in his wars, were summoned to a parliament to assess the escuage; so the barons of the ports and boroughs were summoned to the King's court to settle the tallage, for there were two distinct tenures in the kingdom, that seem to have had originally charters from the conqueror; the military barons that were used to accompany the King in the wars, and the boroughs which used to maintain the navy. And there was also a third sort, which were the antient demesne lands, which used to maintain the table of the King. As to the tenants in antient demesne, || they generally used to bring in their

* By barony. § Less barons.

† Two knights girted with swords. § In chief.

|| Ancient dial. p. 20. Seld. Eng. Janus 57. 2 Seld. 1003.

corn or gabel rent in specie to the Exchequer : these that held in burgage tenure, were used to present particular donatives to the King, upon particular expeditions. These last were often sent for and consulted in foreign expeditions where the navy was concerned.

Burgage tenure.

These burgage tenures were various according to the different nature of their patents ; for some held at a certain rent, others to fit out ships for the navy. But the most general way of infeudation was by certain rents. And as the tenants **in capite* that held by military service, were often summoned to give aids to the King, over and above their military duty ; as aid to the King's son, or to marry the King's daughter ; so those that held by burgage tenure, were summoned when the King desired a donative, and donatives were then given in the King's courts for each particular borough, and they were there registered and accompted for by the sheriff ; and this was over and above their constant rent and services, paid for such boroughs, under the name of tallage.

Tallage what.

But towards the period we have mentioned, all the representatives of the burgage tenants, and the representatives of the † *barones minores*, were cast together into one house. And as the military barons in former times, gave their aids apart upon every knight's fee, and the burgage tenants gave their donatives apart so much upon every borough ; upon the coalescence of the † *barones minores* and the burgessees into one house, they fell into a new way of taxing, which was by way of subsidy : as the tenth penny of every man's substance, which they called dismes, and the fifteenth of every man's substance which they cal-

Tallage by subsidy.

* In chief. † Less barons.

led

led * *quinzimes*. These were raised by particular laws, and were gathered by distrefs, according to the value of every man's personal substance, and at the time when every man's personal substance was visible. I find in *Ryley's Placita parliamentaria* † 516, a writ to the clergy for the gathering their tenths, and that they themselves should appoint collectors. And it seems that books were kept by the crown, of the state and condition of the clergy and laity, when these taxes were collected.

But because the commons, sitting by right of representation, could give no more than they were impowered by their principals, therefore all taxation used to begin in their house; neither would they suffer it ever to be altered, because they looked upon that to be a breach of trust, in not conforming to the original instructions, they received from their principals. This seemed to be taken from the customs of the antient boroughs, who were instructed to give a particular sum for every particular borough: and they did not immediately leave that way of taxing, and afterwards, when they came into a more general way of taxing by tenths and fifteenths, they used to consult their principals, as they had formerly done, what they could bear; and when once by consultations together they had formed one general subsidy, they would never suffer it to be touched by the superior baronage. This gave the power of the purse to the commons, which as it gave an opportunity to the crown to gather great sums of the people, so it made them a balance for the antient baronage, and in after-times even too great for them.

Taxation always granted by the commons.

* Fifteenths, † Pleadings in parliament.

Impeach-
ments origi-
nal in the
house of lords.

But the power of judicature was reserved to the antient baronage, or the * *barones majores*. This arises from the history already mentioned, for the * *barones majores* were generally the persons who were summoned for hearing the causes, and these as well ecclesiastical as temporal. And in the antient times, chiefly ecclesiastical great causes were generally heard by them, as well originally as by appeals, as may be seen in *Ryley* above quoted. Where likewise we find many instances of original causes, referred to inferior courts that were of no great moment. But all petitions against great persons, and the prince's officers, were heard in this court. From hence this became a place of original jurisdiction for impeachments, which were preferred either by private persons or by the whole commons of *England*: and likewise the † *dernier resort* to correct the errors of inferior judicatures; but as to original causes they began to refer them to the inferior jurisdiction, to avoid a multiplicity of that sort of business, as may be seen in *Ryley* 156, 157. And when any matter of fact was to be tried, there used to go out writs to the justices in Eyre, to summon the parties before them, to try the fact according to the command of the writ, as may be seen in *Ryley* 74, 75.

The barons
wars break the
power of the
justicier into
several courts.

The next police that was introduced after the wars with the barons, was that of breaking the power of the justicier into several courts, which make the ordinary jurisdictions that are now in being; (that is to say) the chancery,

* Greater barons.

† The last resort or appeal.

the King's bench, the common pleas, and the exchequer.

First, as to the chancery; and that had a four-fold use; first, as an * *officina brevium*; secondly, as a controul and cheque upon the court of exchequer, and thirdly, as a *Latin* court for the proceedings on the records there touching persons privileged; fourthly, as a court of equity.

First, as an * *officina brevium*; antiently the masters in chancery made out all summonces to parliament, and the writs for the common pleas to proceed upon. But after the ‡ *magistri cancellarii* had settled proper writs and commissions, and those things began to be of course, then had they proper under officers, which made out their writs of course, and they began only to attend the making out of the new writs in extraordinary causes, and the ordinary writs and commissions were made out by the proper officers. Hence it came to pass that the officer called the clerk of the crown, made out all state commissions, after the forms of them were settled; as commissions for justices errant, and of assizes, general gaol delivery, † *oyer and § terminer*, and of the peace, writs of association and || *dedimus potestatem*, for taking of oaths, and all general pardons and special pardons; also writs of execution upon the statute staple, which were annexed to this office, in the time of Queen *Mary*, for their continual and chargeable attendance. All which writs were before made out by the cursitor.

* An office for writs. ‡ Masters in chancery.

† To hear. § Determine. || Commissions.

The cursitors were formerly as clerks to the masters who made out the writs, and were afterwards settled into a distinct office to make out the * *brevia de cursu*. There were likewise in this court clerks of the *Hanaper*, who registered the fines that were paid on every writ, and saw that they were sealed up in bags, in order to be opened afterwards and issued; and the comptroller who attended and inspected the opening of the bag, in which the writs were put, and was a check upon the clerks of the *Hanaper*.

Clerks of the
Hanaper their
duty.

The reason of
the institution
of the officina
brevium.

The reasons of the institution of this § *officina brevium* are many; first, that it might appear, that all power of judicature whatsoever flowed from the King, and therefore there was a sum-
monce even to the peers in parliament, that sat † *in jure proprio*; so likewise for the lower house of commons; the basis of the same was made by writs that issued out of this court, and were returned into the same office; and also in every judicature there were particular patents, which shewed the extent of their commissions, and that their power was derived from the crown.

Second reason. Another reason for this institution was, that the crown might have their proper fines. || These were antiently paid to purchase justice from the crown; for they would not suffer persons to come into the King's courts, and engage the power of the King to do right to private persons, without first receiving something from the subject towards the charges of the court,

* Writs of course.

§ The office for writs.

† In their own right.

|| Ancient dial. p. 56.

and the expence of the judicature. Infomuch as in the antient times the King used to summon several of the barons to attend the hearing of such causes ; but afterwards by **Magna charta*, these were reduced to fines certain, that the crown might not be defrauded, and the writs were taken out of the court of chancery, returnable in the other courts, that one court might be a check to the other.

A third reason of this institution was, to keep an uniformity in the law ; for whether these writs went out to the sheriff in nature of a justicies, or whether they were returnable before the justices in Eyre, or justices of the common bench or assize, they were still made in one form according to the nature of the complaint, which was both a direction to the judge, and a limitation of his authority. Third reason.

The second office of the court of chancery was that of a check upon the court of exchequer. † The sheriffs, the escheators, and all other officers relating to the revenue, were sworn in the exchequer ; and when they § *virtute officii* took an inquisition of the death of any person, of the lands of which he died seised, they used to return it into the exchequer. Second office of the chancery.

But the chancery, in order to quicken these officers, would issue writs, and when they took any inquisition || *virtute brevis*, they were wont to return it into the chancery. But to understand the authority of the court of chancery in relation to the revenue, and what share of jurisdiction was settled in that court upon the

* The Great charter. † Ancient dial. Excheq. p. 50. b.

§ By virtue of their office. || By virtue of the writ.

division of the courts of justice, it will be necessary to look into what was the usual business of the chancellor in the first *Norman* period.

In the antient times the chancellor was likewise chaplain to the King, and it was his business in the time of the justicier to write the *diplomata*, that is, all charters and commissions from the King. Therefore when the power of the justicier was broken, he obtained the* *officina brevium* and †*cartarum regiarum*. From thence all the extraordinary jurisdictions touching granting of charters, as likewise all inquests of office to intitle the crown, were returned into this office. And the exchequer, in which these things were antiently transacted, became only an ordinary court of revenue to let leases to the King's farmers, and to get in the King's debts. And therefore the office in the exchequer was only an office of instruction, of what lands were in the King in particular counties. But to vest lands in the crown § *de novo*, it was necessary to have an office under the great seal, and so to grant lands from the crown (unless it were merely the farms that were granted for years) it was necessary they should have patents under the great seal.

See Gilb. hist.
view of the ex-
chequer 132,
133, 134.

5 Co. 52.
10 Co. 115.
Page's case.

From hence, when any writ went out of the chancery in order to quicken the sheriffs and escheators, it was returned into that court as part of the extraordinary jurisdiction that fell to the share of the chancellor after the division of the courts, and there any party grieved was to come in to traverse. And so if a || *scire facias* issued to repeal any patent, it was returnable in-

* The office for writs. † Royal charters. § Anew.
|| Writ to shew cause.

to this court, because there such patents were registered, and there the party came in and pleaded before the chancellor. And if a demurrer was joined the chancellor was judge. But if they pleaded to issue, the chancellor could not award a jury process, but was to carry the record itself over to the King's bench, who awarded the jury process upon it; and afterwards upon the verdict gave judgment. And the reason of this seems to be, that the chancery being the * *officina brevium*, if it could have tried issues, might have easily encroached upon other jurisdictions, in making the writs that were issued out of his court returnable into it. And from hence it was that they kept original and judicial writs distinct from each other. For tho' the chancery gave judgment upon such inquisitions, and upon a † *scire facias*, where a demurrer was joined, yet such judgment was either to remove the King's hands, or to repeal the patent, upon which no judicial writs needed to issue.

Why the officina brevium could not award jury process.

Thirdly, the said jurisdiction was as a *Latin* court for the proceeding on the records there, touching persons privileged, and also upon recognizances.

Third office of the court of chancery.

As to the privilege of officers, this was plainly arising from their attendances. And their jurisdictions in recognizances arose from the records remaining with the chancellor here. And because they had in the former cases usually given judgment in demurrer, so in this case, when demurrer was joined they gave judgment also. But they never having issued

* The office for writs. † Writ to shew cause.

any jury process in the cases of the revenue, in the old *Norman* times, so in these privileged cases they issued no jury process, because they had never done it in the cases of the revenue.

What makes
the petty bag.

These two last jurisdictions in the chancery, make up what we call the petty bag, whereas all the original writs that were the foundation of all the business in the courts of justice, were put together in the *Hanaper*: so the writs that went out to return inquisitions into the chancery, were returned into the petty bag; which gave the distinction to those names and begot distinct officers in the court.

Fourthly, of the court of equity.

The court of
equity newly
erected after
the division of
the courts,
which was
when the
grand justici-
er's power was
taken away af-
ter the barons
wars.

This court was newly erected after the division of the courts, and from a very small and inconsiderable beginning, hath not only curbed the jurisdiction of the common law, but hath introduced a new process, and a new manner of tryal, totally before unheard of. And which, tho' it was very much impugned even towards its first original creation, yet could never be remedied, and is now grown to that degree, that it has swallowed up most of the other business of the common law courts; we must therefore see what footsteps there were for this jurisdiction in the antient * *curia regis*. And that there must be some footsteps for an *English* proceeding to give occasion and rise to this court, seems to be plain, from the *English* jurisdiction in the court of exchequer, as well as that which is exercised in the court of chancery.

* King's court.

There was no doubt, a power in the antient Register brev
** curia regis*, upon *treasure trove*, or goods de- 24.
tained from the King, to send to the party by
a † *venire facias*, and examine him upon articles
administred to him upon oath. We find this
now practised in *English* informations in the
King's behalf in the exchequer, and likewise
upon impeachments in the house of lords,
where articles are exhibited in *English* for the
parties to answer. But in the court of the King
between party and party, the pleadings were in
French, and afterwards entered upon the roll
in *Latin*; and they were entered thus in *Latin*
[before the statute of 28 E. 3.] to keep a per-
petual memorial of what was done in the courts
of justice, which they thought could not be
in changing and fading languages. When the
party came in, he answered to such articles,
and if he discharged himself upon oath, he
was acquitted; but if they proceeded against
him by witnesses, it was upon *Latin* informa-
tions, where they always descended to issue.
And there was no more to warrant this jurif-
diction in the antient ** curia regis*.

At the first division of the courts, the chan-
cery was very tender in making out writs,
in cases where there had been formerly no pre-
cedents, in the antient *curia regis*, which are
now called § *actiones nominatæ*; because they
thought the antient footsteps that were in
former courts of justice, were the bounds of the
law; therefore when ever there was a new case,
that seemed to require remedy, the ordinary

* King's court.

† Writ to summon the party.

§ Nominal actions.

2 Inst. 405.
Stat. Westm.
2. c. 24. gave
a power to the
chancellor in
new cases to
invent writs.

jurisdiction referred them to petition the next parliament, where proper remedies were given for the peculiar cases. But because this multiplied petitions to parliament, there was a peculiar law made, by which it gave the court a power in a new case to invent a writ, which is the *Stat. West. 2 cap. 24.* * *Et quotiescunque de cætero evenierit in cancellaria, quod in uno casu reperitur breve, et in consimili casu cadente sub eodem jure, et simili indigente remedio, non reperitur, concordent clerici de cancellariâ in brevi faciundo, vel atterminent querentes in proximum parliamentum, et scribantur casus in quibus concordari non possunt, & referant eos ad proximum parliamentum, & de consensu jurisperitorum fiat breve, ne contingat de cætero, quod curia Domini Regis deficiat conquerentibus in justitiâ perquirendâ.*

Writs founded
on this statute.

Tho' the chancery by this statute was armed with great power, yet the officers there used it very modestly, only to grant jurisdiction to other courts upon writs in new cases; and for this the writ of entry † *in consimili casu* which relating to lands, was by way of eminence said to be founded upon this statute. There were likewise founded upon this statute, actions upon

* And as often as it shall for the future happen in chancery, that a writ be found in one case, and not in a similar case of equal justice, and where the like remedy is wanting: the clerks in chancery shall agree to make a writ, or the suitors be at liberty to apply to the next parliament, and such cases, concerning which they cannot agree, shall be transcribed, and referred to parliament; and the lawyers shall consent to a writ, that the Lord the King's court may not for the future be deficient in doing justice to the suitors of it.

† In the like case.

the

the case, upon several trespasses, in which cases there were not found any writs in the Register. But towards the times of *Richard* the second, they not only made use of this statute for the making of new writs, but for the erecting a new jurisdiction; and the occasion was this. The making the statute of *Mortmain* had curbed the growing power of the clergy. They afterwards found out an invention to avoid the statute by giving away lands to trustees for pious uses, and the feoffees of such trust did the duties of such tenure in behalf of the trust; but if they perverted the trust, the ordinary jurisdiction could take no notice of it, as being against the statute of *Mortmain* so to do; but *John* ^{3 Selden} *Waltham*, then bishop of *Salisbury*, and chancellor, ^{1544.}

(as the commons mentioned in their petition) out of his subtilty found out and began a novelty against the form of the common law, and that was the invention of the writ of subpœna. This writ summoned the party to appear under a pain, to answer to such things as were objected against him: and a petition was lodged in chancery containing the articles to which he was obliged to answer, and upon such articles it was that this new invented writ issued. But the 7 *R. 2. cap. 6.* was made to hinder the growth of this court, by which damages were given to such persons that were drawn into chancery, or before the King's council, upon such false suggestions. ^{The writ of subpœna first found out, and by whom.} ^{Damages given to persons drawn into chancery by false suggestions.}

There are petitions of the commons against this new invented jurisdiction. But when they had settled this new process of subpœna, in order to make the party appear, they took the whole process that had been used in parliament,

The attachment made use of.

Commission of rebellion.

liament, in order to bring persons to answer charges exhibited before them. That is, the attachment whereby they took up his body as a contempt for not appearing, the proclamation commanding him to appear upon pain of his allegiance, and likewise to attach his body wherever he was found, either within liberties or without. The next was a commission of rebellion, which recited the proclamation, and ordered the person to be taken up wherever he was found: and likewise a command to all constables and bailiffs to assist the sheriff. These were all directed to the public ministers and officers of justice, and plainly appeared to be the antient prerogative process to compel an appearance in the supreme court of judicature.

Serjeant at arms.

Sequestration.

A sequestration before a subpoena upon men in custody

2 Chan. cases

44.

Cro. Eliz. 651.

Danv. 306. p.

1 Moor 549.

Blagrove v.

Watts.

If these three processes did not fetch in the party, it was presumed there was some negligence in the officers and ministers of justice, and therefore the supreme judicature sent an officer of their own, to see whether the party did really hide himself from justice, or not; and if the officer returned that he did, then issued out a sequestration upon all his lands, goods, and chattels whatsoever; these are the two last prerogative processes: and long it was before the court of chancery could fix them to subserve the justice of that court. For the courts of common law so far impugned the sequestration, the last prerogative process, that they held, if the sequestrators were resisted by the party and killed, that it was no murder, but only * *se defendendo*; for that the chancery

* Self defence.

had

had no jurisdiction * *in rem*, but only † *in personam*.

The court of chancery being thus erected to issue process, and the chancellor or lord-keeper that had the government of that court, had the great seal, by authority of which all process was to issue: from hence it was, that there were masters appointed in that court, that made out the forms of the writs, and entered them in a book kept for that purpose, thence called the Register, and such writs are precedents for the future in like cases. And exceptions were taken to writs in the courts to which they were directed, for not agreeing with the Register, and for divers other informalities, because such informal writs raised a presumption that they did not issue out of the great shop of justice, from which all courts ought to found their authority in civil pleas.

Why masters in chancery were appointed.

Register for writs.

By the ordinary jurisdiction on every cause of complaint, the chancellor issued the writ after examination of the plaintiff, that the subject might not be needlessly disturbed; but when the case was extraordinary, and it was necessary to have the defendant's own oath, the chancellor by his extraordinary jurisdiction, had power to send for and examine him, upon the several allegations in the plaintiff's petition; and this gave birth to the *English* jurisdiction of the court of chancery.

The original of the English jurisdiction of the court of chancery.

By the ordinary jurisdiction, on every cause we see that in the times of *Ed. 1.* they began to keep close to the forms of the Register; so

In Edward the first's time they began to keep close to the form of the Register.

* Against the estate.

† Against the person.

that the statute of *Westm. 2. cap. 24.* was made to enlarge the ordinary jurisdiction only. For it was then doubted whether the chancellor could go beyond the settled forms of the writs, because he was obliged to follow the law, and was not entrusted with the power to innovate and make new laws; but this statute only gave power to the chancellor to make out new writs, where he found similar cases, therefore the extraordinary jurisdiction where there were no like cases, or where the party was to be examined upon oath, was left as it was before.

C H A P. II.

A comparison of the proceedings in the civil and canon law with those of the court of Chancery.

Corvin. Dig.
lib. 2. tit. 4.
De in jus vo-
cando.

ANCIENTLY, among the *Romans*, every one might cite his adversary without process, * *et invitum, et reluctanter obtorto collo in jus, hoc est, ad tribunal prætoris, testato tamen trahere*; for they could not take him by the collar, to draw him before the prætor without a witness, before whom the party declared, that he intended to draw the person, whom he laid hold of, before the prætor, and not to

* And drag him by the collar, notwithstanding his unwillingness and resistance, to justice, that is, before the prætor's tribunal, provided it was done in the presence of a witness.

assault him injuriously; and this was called
 * *Antestatio*: afterwards the prætor, by his
 edict, prohibited certain persons to be drawn
 thus to justice, without his permission, as ma-
 gistrates, and afterwards, those to whom re-
 verence was due; and from hence they came
 to citations, nor did they permit any body to
 be drawn out of his own house, because it was
 said, that the person was sufficiently punished,
 who was forced to lie hid in his own house;
 and the † *actor*, if the person was cited at his
 house, and did not appear, was put into
 possession of the goods of such person.

The citations were two-fold, either § *verbalis*,
 or || *per nuncium*, and the § *verbalis* was in wri-
 ting, and was either given to the person, or left
 at his house: the citation, || *per nuncium*, which
 was called ‡ *realis*, was by persons sent by the
 prætor, when the person did not appear upon
 the ** *verbalis citatio*, and this was the †† *ap-
 prehensio personæ*.

When the † *actor* and §§ *reus* came before
 the prætor, then the † *actor* did ||| *actionem
 edere*; and antiently this was done by shewing
 the cause of his action to the prætor, who
 thereupon gave him out his proper action, but
 afterwards the † *actor* used to have his cause of
 complaint ready in writing, to offer to the
 prætor, which they called the libel, and with
 it produced such contracts or instruments, as
 were the foundation of his title or complaint,
 and then the §§ *reus* was obliged to give bail to

* The calling one to witness. † Plaintiff. § Verbal.

|| By a messenger. ‡ Real. ** Verbal citation.

†† Taking the person. §§ Defendant. ||| To declare
 his action.

The reus to appear at the third day afterwards, which was give bail three called * *dies perendinus*, and this time was days after the given him, to consider whether he would con- libel given in. test or not, at the third day; if he contested

The contesta-
tio litis.

Juramenta ca-
lumniæ post
litem contesta-
tam, which
were that the
actor did not
sue, nor the
reus defend,
out of malice.

the suit, there were forms of questions and answers, which mutually passed between the † actor and § reus, in which questions the † actor affirmed his right, and the § reus denied it, and this was called || *contestatio litis*. Likewise before the prætor, the § reus, without contesting the suit, might put in ** *exceptio declinatoria*, as also, he might desire that the † actor might be sworn, that the suit was not commenced out of malice; as the † actor might have the § reus sworn, that he did not defend it out of malice; and these oaths were called †† *juramenta calumniæ post litem contestatam*. The prætor gave them judges, and the libel contested was brought before the judges, and upon this libel the † actor put in positions, to which the § reus was obliged to put in his answer, that so they might supersede the necessity of proving what was confessed by the § reus, but if the § reus denied any part of the positions, then the part that was denied, was formed into what they called §§ *articuli*, and upon these §§ *articuli* interrogatories were framed to be exhibited to the witnesses, but the witnesses were not obliged to answer any interrogatory which was not framed out of one of the articles; upon these interrogatories, one of the ||| *judices dati* himself examined, and the depositions were taken in writing by a notary,

* The day of appearance. † Plaintiff. § Defendant.

|| Contesting the suit. ** A dilatory plea.

†† Oaths of not proceeding out of malice before the suit began. §§ Articles. ||| Appointed judges:

or

or one of the judges clerks ; when all the witnesses were examined, both for the *aëtor* and *** reus*, then they published the depositions, and gave out copies of them to both parties ; upon which the ** jurisperiti* & *patroni* made the orations for their clients before the judges, and then the judges pronounced their sentence, which was given to the prætor to be executed.

But to describe this more fully, tho' according to the antient form, any *Roman* who had demand against another, might drag him to justice † *obtorto collo*, as they called it, yet that being found inconvenient, they came to a new method, which was, that they should first § *edere actionem* before the prætor, and then the prætor gave him out his proper action, and a liberty to cite the party, and he either cited him by himself, or by a messenger, and then the defendant was either obliged to go along with his adversary, or give security to appear ; and if he did neither, the *aëtor* might † *obtorto collo* force him before the prætor ; when the *** reus* came in before the prætor, the *aëtor* did produce his cause of complaint, which was sometimes called the second libel, for the first libel was in order to obtain the power of citing, and was called the †† *libellus supplex*, and the second to shew the *** reus* what he was to answer, was called the §§ *libellus actionis aut meritorius*, and then the *aëtor* asked of the prætor *potestatem agendi*, that is, the power to implead the defendant, and ||| *formulam*, containing the

Corvin.in vul-
tim. 309, 12,
13, 14.

The aëtor was
obliged to de-
clare his cause
of action be-
fore the præ-
tor.

Libellus sup-
plex, what.

Libellus acti-
onis, what.

* Lawyers and patrons. † By laying hold of his collar.

§ Declare his action. || Plaintiff. ** Defendant.

†† Suppliant libel. §§ Libel of the action, or which
tended to the merit of the cause. ||| The commission.

form of the action, and * *judicem*, who was to hear and determine the matter.

And for that end, the † *actor* did summarily shew before the prætor, how the action accrued; and if it was founded on any instrument he produced it, if not a witness before the prætor; here likewise the § *reus* proposed his exceptions, either || *declinatoriæ*, also called ** *dilatoriæ*, or †† *peremptoriæ*; tho' the *peremptoriæ* might also be put in before the judge; and thus the cause *agebatur summam*, as they call it, and the prætor determined, whether they should proceed in judgment or not; if the prætor adjudged they were to proceed, then the § *reus* was either to yield or give up the matter in demand, or contest it, which was the §§ *litis contestatio*, and was closed before the prætor.

Cross inter-
rogatories what. When the prætor had given a judge, he was to make out a citation against the § *reus* to appear before him, and there the first act was, for the defendant to answer the positions on the libel; after those positions were answered, the next citation was upon the articles, upon which the defendant was to bring in his cross interrogatories to the witnesses, who were to be examined on the part of the plaintiff upon the articles, as likewise any witnesses of his own, which he had to produce on the matter of the articles; and at that act there was given a probatory term, within which all witnesses were to be examined, and the depositions afterwards to be published. One of the judges who was

* The judge. † Plaintiff. § Defendant. || Shuffling.

** Dilatory. †† Peremptory. §§ Contesting the suit.

to hear the cause, was one of the persons who examined the witnesses, and reported as to their credit, as, whether they answered truly, or only as they were instructed. The third act was the citation after the probatory term was over, and publication had passed, in order to hear judgment; so that in every judiciary act, there was need of a citation, lest they should proceed * *parte inauditâ*, which they thought to be unjust, and contrary to the law of nature.

At the hearing of the cause the ‡ *advocati* Pith.verb.Ad-
came, who were the persons who attended the vocat. Patron.
causes on both sides, and gave advice in matter et Vorat.
of law. There was likewise the † *patronus*,
who was the person who defended the § *reus*,
and was called the orator, if he was a man of
great eloquence, tho' the † *patronus* and the
orator differed in this, that the † *patronus* was The difference
confined to judicial pleadings; but the orator between the
undertook all manner of causes, as well delibe- patron and
rative and demonstrative, as judicial. orator.

When sentence was given, such sentence was Wood's civil
delivered to the prætor, and if it were of a law 334.
thing corporeal, the prætor put the || *actor* into Where the
possession; but if it was a matter incorporeal, corporeal was
as obligations, &c. then the || *actor* was put into given.
possession of so much of the moveable goods Where the
of the § *reus*, as would satisfy the debt, except- moveable
ing always the tools in trade and husbandry, goods.
and the beasts of the plough, if enough besides
to answer the debt; and if no moveable goods
were found, then the immoveable goods were

* Without hearing the other side. ‡ Advocates.

† Patron. § Defendant. || Plaintiff.

seized

Where the bo- feized, and for want of such the person of
dy of the reus. the || *reus* was at last taken in execution.

Citation Gal. 90. The beginning and foundation of every cause is the citation by the canon law, tho' the libel

Maranth. 240. must be regularly in before the return of the citation, and regularly is supposed to precede it, and therefore the canonists say, that it is not enough in the citation to express the cause * *in genere*, but so explicitly, that the person cited may know for what cause he is called, and that he may come prepared to answer; but it is not necessary to insert the tenor of the libel in the citation, especially in civil causes; but if they transmit the tenor of the libel with

Where the reus is cut off from all dilatories. the citation, then the defendant must come prepared to answer, and is cut off from all dilatories; from hence comes with us the subpœna † *ad respondendum*, which is called the subpœna § *certis de causis*, which never inserts the tenor of the libel or bill, and therefore time

Gal. 96. is given to answer, but the bill is supposed to precede it, and prays a subpœna; as the libel was supposed to precede the citation, by the canon law; but it was sufficient both by rules of equity, before the statute for the amendment of the law, and by the canon law, if the libel or bill was in, by the day of appearance, which was four days inclusive, after the return of the citation, and that was the same as the ** *dies perendinus* in the old civil law.

4 & 5 Ann.
c. 16. sect.
23.

Our citation was formed § *certis de causis*, and not to express the substance or abstract of the libel, as they in the civil or canon law, because

|| Defendant. * Generally. † To answer.

§ For certain reasons. ** Day of appearance.

they

they were to appear to answer † *libellus articulatus*, of which more hereafter; which being formed upon several circumstances, could not be commodiously inserted in the citation; and the canonists went so far, that if any person was cited to appear || *ad certam causam*, he was obliged to answer to any other cause, because they said that the effect of the citation was appearance, and so we have ruled it, that he is obliged to answer any other bill of the same plaintiff, because he has appeared to that plaintiff, and therefore there is no occasion to have him further cited; but if any other plaintiff puts in his bill, he must be cited * *de novo*, because by his appearance he is supposed to have instructed his proctor or clerk, † *quoad* that plaintiff and no other.

If there be error in the name, in the citation, in the christian or surname, there, if another person so named be served and appears, he shall have his costs, both by the canon law and equity; but if the person falsely named be served, and don't appear, there, they cannot proceed in any process against him, because no person is cited § *et nullæ sunt qualitates*; and therefore it should seem by both laws, that if he appears and goes away without answering, there can be no process against him; because the process must run upon the foundation of the citation, and the process against *Peter* can be founded upon no contempt or contumacy against *John*; but if the first citation be right, and there be any

Gail. 93.

Error in the christian or surname, or if another person appears he shall have costs.

† The articles of the libel. || For a certain reason.

* Anew. † As to. § And there are no qualifications.

mistake

Mistakes in the mistake in the subpoena * *ad rejunendum*, or subpoena to re-join or hear judgment, are cured by appearance.

† *audiendum judicium*, there by both laws it is cured by appearance; because by appearance he contests both in the proofs, and at the hearing; for if he examines his witnesses he waves the mistake in the subpoena * *ad rejunendum*; and if appears at the hearing, he waves the mistake in the subpoena † *ad audiendum judicium*.

Durand. 77. If the person falsely named in the primary citation appears, he may by both laws pray to be dismissed with costs.

Gail. 99.

Subpoena must be returnable on a court day, otherwise void.

The citation was of no validity, unless it was made returnable § *ad diem juridicum*; because the day of appearance must be § *ad diem juridicum*; and this rule prevails as well in the canon law as the court of chancery; but if the subpoena be returnable with us § *ad diem juridicum*, at the latter end of the term, for expedition, the defendant is obliged in the court of chancery, to appear and answer within eight days after the term, the defendant living within twenty miles of *London*; because the chancery is open after the term, and the defendant is cited to appear as of that term, and to answer of the same term.

Gail. 100.

By the rules of the canon law, in causes which require celerity, and where there was danger of delay, a citation might be || *ad diem feriatum*; and hence it is, that out of term you may have a subpoena out of chancery, returnable immediately, upon affidavit that the defendant lives in town, or within ten miles thereof.

* To rejoin. † To hear judgment.

§ On a court day. || On an holiday.

By

By the canon law, and rules of the court of chancery, a * citation or subpoena may be served at the house of the party, as well as personally; because it is presumed to have come to his knowledge, and that therefore the defendant ought to appear.

Gail. 103.

Citation may be served at Defendant's house as well as personally.

As for the time of appearance, after service of the citation, the canonists determined that the † *citatus* must have so much time, that § *ad locum citatum commode venire posset*; and they reckoned this || *per dietas*, twenty miles being a day's journey; from hence the first rules in chancery came to be, that if a man lived within twenty miles of town, he must appear in four days after service of the subpoena; but if the subpoena was made returnable immediately, which was the quick process against those who lived within ten miles of the town, the person cited was to appear within two days.

What time

defendant has to appear on a citation.

C H A P. III.

The original of the English practice.

BY the old civil law, where any person was cited, he was to appear before the prætor within three or four days after such citation, or they proceeded to apprehend him as a per-

Cod. lib. 3.

tit. 9. verb.

Offeratur.

Nov. 53. cap. 3

* N. B. A citation may be served on a Sunday, and good. Carth. 504. † Ld. Raymond 706. arg.

† The person cited. § So that he might conveniently come to the place he was cited. || By days journeys.

son

Corvin. in
Codicem, lib.
3. tit. 9. fol.
99.

Code cum
Glossis, lib. 3.

tit. 9. 544.

The dies pe-
rendinus was
the fourth day
after the cita-
tion, and from
this comes our
quarto die
post.

Reus hath ten
days to put in
his exceptions.

son contumacious. This third or fourth day was called the * *dies perendinus*, and from the Roman law the † *quarto die post* had its original, which was the third or fourth day after the return of the process. This time was given by the Roman law and by ours, for the defendant to agree with his adversary; when the § *reus* came before the prætor, the plaintiff was || *edere actionem*, as is already mentioned; and by the old civil law the § *reus* had two days to put in his exceptions, either dilatory or peremptory, and if he did not put them in within that time, he was contumacious, and the prætor either put the plaintiff in possession, or sent further process to apprehend the person of the defendant. Justinian, by the Novel Institution, lib. 3. tit. 9. *Offeratur*, added twenty days, in which the § *reus*, after appearance, might agree with his adversary; and this he did, because the judge was to be appointed by the prætor, and both the ** *actor* and the § *reus* agreed by solemn words, to stand the determination and sentence of the judge, so given by the prætor.

Durandi spe-
culum de dila-
tionibus.

Maranth. 326.

By the canon law, there was no judge given, for the ordinary appointed the judge, but there were four days for the § *reus* to appear, which was according to the old method of appointing a * *dies perendinus*; but when the § *reus* appeared, he had not twenty days to put in his answer, as he had by the Code. But they gave him a term to put in all his pleas

* Day of appearance. † Fourth day after.

§ Defendant. || To produce his libel ** Plaintiff.

to the libel, according to the nature of the case.

In the institution of the court of chancery, they had four days after the return of the writ, to appear; this was according to the canon and civil law, and also according to our own, which appointed the * *quarto die post* the return of the writ, as the day of appearance; and when the party appeared, he had a peremptory time to answer, which was eight days from the day of appearance, so that the time for answering was double to the time of appearance; for they thought the time of twenty days, which was given by the Code, was too much; and they thought to leave a latitude to the judge to appoint a dilatory term, as they did in the canon law, was too uncertain; and therefore they appointed double the time of appearance, for the proper time of answering.

But if the subpœna was returnable immediate, then there were two days appointed for appearance in chancery, exclusive of the day of service, for that they construed to be immediate, when the time of appearance was shortened by one half; but they gave them the same time to answer, because a person living within twenty miles of *London*, might have a necessity for the same time, in the preparation of his answer; and therefore, he had the same time allowed him. The exchequer was a chancery originally for the debtors of the King, and therefore, where the subpœna was returnable immediately, they were to ap-

Reg. in Canc. 16.
After the return of the writ the defendant had four days to appear, which is the *quarto die post*.
After appearance he had eight days to answer from the day of appearance.

If returnable immediate two days for appearance, exclusive of the day of service.
If he does not appear immediately, an attachment issues against him.
Rules and orders in chancery and exchequer.

* Fourth day after.

On immediate
subpœna in
the exchequer
the defendant
was to appear
the next day.
If returnable
at a certain
day the defen-
dant was to
appear in two
days.

Where four
days were al-
lowed for to
appear upon
subpœna in the
exchequer.

Marantha
258.

Durandus
108, 9, 10, 11.

Primum de-
cretum.

appear the next day after service, because the King's debt might not be delayed for want of their appearance, if the subpœna was made returnable at a day certain, that being out of the common course, required more haste, and therefore they were to appear in two days, and the rather, that the defendant might not have time to fly from the process of the court; and therefore, where it was returnable immediate, or upon a day certain, there was less time given to the defendant, that he might not have an opportunity to fly from the attachment; and on the original settlement of this process, the issuing it out in this extraordinary manner, shewed that it required haste; but if it were a common return, that being in the ordinary form, they were to appear in four days, as they did in chancery, but when they had appeared, they had the same time to answer as they had in chancery, because they had a like necessity for time to make their defence.

By the canon law, the defendant was to be thrice cited, or else * *per unum peremptorium*, and then, if he did not appear, he was pronounced † *contumax*; but if the defendant had no house where he could be cited, he was cited § *per proclamationem* in the vicarage of the place where he lived; and if he did not appear upon the proclamation, he was likewise † *contumax*, and upon the contumacy of the defendant, the plaintiff obtained the || *primum decretum*, to put him into possession of the

* Peremptorily. † In contempt. § By proclamation.
|| The first decree.

defendant's goods, or at least as much of them as would answer the debt, if it was a debt that was demanded; or in possession of the thing itself which was demanded; as if it was * *fundus*, or the like; and this † *primum decretum* was founded upon a summary proof of the plaintiff's cause of demand, upon his oath. Maranth. 259.

And if the defendant persisted in his contumacy for a year, then the judge came to the † *secundum decretum*, whereby the plaintiff was decreed the property of the thing in demand, of which he was put in possession by the † *primum decretum*; and if it was a debt which was demanded, the goods of which he was put in possession by the † *primum decretum*, were sold to satisfy such debt; but then the plaintiff produced witnesses before the judge or instruments, to prove the truth of his demand. Maranth. 260.

If the defendant appeared before the † *secundum decretum*, he was liable to a mulct, for he could not be heard in the cause till he had cleared his contempt by reimbursement of the plaintiff's expence, and he was likewise to give security to abide the decree. Ibid. 261. Durand. 104.

In civil causes they had not regularly a real citation, which is the taking of the person of the defendant; but yet they might have such real citation, if the person cited was ‖ *contumax*; if such person had no goods, of which by the † *primum decretum* the plaintiff Maranth. 247.

* An estate. † First decree. § Second decree.

‖ In contempt.

might be put in possession; for then his body was to answer.

The nobility
cited in writing.
Maranth. 250.

If the defendant was * *persona illustris vel clarissima*, he ought to be cited in writing, because it was the most respectful manner of application.

The citation may be served by any body; and even by the plaintiff himself, because the authority of the citation is from the commission of the judge, and not from the act of citation; and therefore, whoever bears it, it is the same to enforce the appearance of the party.

Gail. 101.

If this citation be from the prince, then the very first is peremptory, and if the person does not appear, he is † *contumax*.

The subpœna is with us the citation, and if an affidavit be made of the service of it, and filed, and the defendant does not appear at the times above mentioned, he is † *contumax* of course, because this is a citation from the prince.

4 Inst. 84.

The next step is the § *apprehensio realis*, which takes up the person of the defendant; and they proceeded thus to take up the person, and not to || *missio in possessionem*, according to the civil law, by reason of a prejudice among the lawyers at the erection of this court; for they apprehended that the court had no authority but against the person, since it was to deal with the conscience of the party, and that it could not put the plaintiff into the possession of the thing itself.

* A nobleman or person of distinction. † In contempt.

§ Attachment. || Put a person in possession.

If the sheriff, who is the officer of the court, upon a contempt returns * *non est inventus*, upon the attachment, then they proceeded as in the civil law, to a proclamation, which with us, is an attachment with proclamation; and if upon the proclamation there was a return of * *non est inventus*, there went out a commission of rebellion, to apprehend him as a rebel; and if upon that there was also * *non est inventus* returned, they sent the immediate officer of the court, who is the serjeant at arms, to seek and take him; all these were † *citationes reales*; so that they had three † *citationes reales*, before they came to the § *primum decretum* or sequestration; and this was gained with great struggle, it being an old prerogative process against a rebel, that all his goods should be seized and sequestred.

Attachment with proclamation.

What real citations are.

The canonists do take the proclamation, or § *primum decretum*, to be || *quasi litis contestatio*; and that therefore the plaintiff may proceed to his proofs, and then the ** *secundum decretum* for the thing in demand may be pronounced: we have no || *quasi litis contestatio* with us, because, unless the defendant comes in, and contests, there is no jurisdiction to a court of conscience; for unless the party confesses the fraud or corruption, of which the court enquires; or it be proved upon him, there is no sufficient ground for a decree, which can't be without †† *contestatio litis*.

The proclamation or *primum decretum* of the canonists. *Secundum decretum*.

* He is not found. † Real citations. § First decree.

|| As it were a contesting of the suit. ** Second decree.

†† Contesting the suit.

D. 2

But

What shall be
deemed an
implied con-
fession.

Ch. Rep. 50.

2 Ch. Ca. 237.

2 Wms. 557.

and see 5 Geo.

2. c. 25.

where the de-

fendant ap-

pears and de-

parts without

answering, no

decree can be

against him but

a sequestra-

tion.

Novel 112.

C. 3.

Proclamation

quasi litis con-

testatio.

But there are two cases, in which an im-
plied confession is a sufficient ground for a
decree.

The first is, when a man appears by his
clerk in court, and afterwards lies in prison,
and is brought up three times to court by
* *Ha. Cor.* and has the bill read to him, and
he refuses to answer; such public refusal in
court does amount to the confession of the
whole bill.

The second case is, when a person appears,
and departs without answering, and the whole
process of the court has been awarded against
him after his appearance and departure, to the
sequestration. There also the bill is taken
† *pro confesso*, because it is presumed to be
true when he has appeared, and departs in
despite of the court, and withstands all its
process without answering; and this seems to
have been the ancient practice of the civil law,
for *Justinian* by the Novel brought in the
§ *secundum decretum*, in the absence of the
party; and the canonists, by a fiction of law,
made the proclamation || *quasi litis contestatio* :
but by the antient civil law, no decree could
be had against an absent person, against whom
process had been issued, but could never be
brought in to appear; and it is so with us,
that if the whole process of the court be
spent, and the defendant never appears, you
can never have a decree, for you can never
make any proofs against an absent person,

* Have the body: A writ so called, because it commanded
the sheriff to *have the body* on such a day and at such a place.

† To be confessed. § Second decree. || As it were con-
testing the suit.

who is never brought into contest, and there is no foundation for a decree without confession or proofs; however the plaintiff has the benefit of the sequestration, which answers to the
* *primum decretum*.

Of the subpœna.

The subpœna is the first process in the court, in order to bring in the party to answer.

The subpœna was antiently and originally a process in the courts of common law, in order to bring in a witness to attest the truth; and it is a summons to the party under a penalty to appear and give his testimony. This process was therefore taken up by the high court of chancery, when a man was convened to answer upon oath, as to the truth of the plaintiff's allegations, because it was the nearest process that was used in case of attestation by the common law.

The subpœna by common law was a process to bring a witness in to attest the truth.

When the chancery first used it.
Confet. 26.
Clerk's prax. 16.

And this was formed after the manner of citations by the civil and canon law; in which it was necessary to insert the names of the defendants, and also of the plaintiffs, at whose suit, and at what time and place, they were to appear.

The return of the subpœna is either ordinary, or extraordinary. First, ordinary; which is at any day certain within the term. For ordinarily no subpœna is returnable in the vacation; the reason of which is the same as that on which depends the constitution of the terms, which is very well deduced by *Spelman* in his Law terms. For anciently the King's

The return of the subpœna two-fold.
Ordinary, which is returnable any day certain in term.

* First decree.

Vacation between each term was settled for the sake of devotion and harvest, &c.

The extraordinary, which is made immediate and in the time of vacation, upon affidavit that the party lives in town, or within ten miles of it.

Pract. Reg. in Chan. 340.
Har. Chan. Pract. 290.

courts were open from three weeks to three weeks, all the year long, as the courts of other inferior lords, for their tenants and vassals: but after the conquest, when business began to multiply in the King's courts, the days and times of devotion, and the time of harvest were set apart as * *dies non juridici*.

Therefore *Hilary* vacation was appointed for *Lent*, *Easter* vacation for the time of *Whitsuntide*, and the preparation for it, and *Trinity* vacation for the harvest, *Michaelmas* vacation for *Christmas*. And the vacations being thus

fixt for the times of devotion and country business, it was thought fit not to disturb the people any more by the extraordinary jurisdiction, than by that of the common law. Secondly, the extraordinary return is made immediate, and in the time of vacation. This by special petition, or motion, to my lord Chancellor or Keeper, and an affidavit that the party lives

in town, or within ten miles of it. And this is excepted out of the general rule, because not within the reason of it. For the parties near the court would not be disturbed, or brought from their country business by such attendance, and the corporation courts in cities were open

all the year long; and therefore it was fit that the court of chancery should be open to all the parties that dwell within a convenient distance from the town, that the jurisdiction might be as extensive as that of any court

whatsoever. But no subpoena is returnable immediately in term time, because you may have it returned at any day certain, as soon as you please, the immediate one supposes an urgent necessity for an appearance, which cannot be

in

* Not court days.

in term time, where the time of appearance is every day.

These mistakes in the subpœna vitiate the writ. First, in the name of the parties; for ^{What mistake in a sub-} if the party served be not named in the pœna will vitiate the writ. writ, there was no authority in the court to convene him, and therefore it was no contempt in the party not to appear. And therefore if an attachment issues upon such subpœna, upon application to the court it will be discharged.

Secondly in the return; as if it be taken ^{In the return.} out in term time, returnable at no certain day; for the party is at a loss when to appear, and therefore there is no contempt in not obeying it.

Thirdly, in the form of the writ; for if the ^{In the form of} form of the writ be mistaken, it cannot be presumed even in the court to which it is returnable that it issued from thence, and therefore the subject shall not be obliged to take notice of it.

There can be no more than three defendants put into one subpœna. ^{No more than three defendants can be put in one subpœna.} The reason is to prevent the vexations of plaintiffs. For if it were equally cheap to put in a multitude of names, the plaintiff might put in abundance of defendants, in order to terrify and vex them; for it is some small inconvenience for a man to hear that there is process out against him, tho' he be never served, and yet unless he be served, he cannot be repaired in ^{No costs unless served.} costs from the plaintiff. And they were also confined to the number three, to prevent the mistakes which the transcribing a multitude of names in the label might occasion.

Husband and wife in a subpœna but as one person.

The husband and wife are taken together but as one of the three, because they are as one person in law, and the property totally in the husband.

What are the charges of a subpœna.

If there be two in the subpœna, it costs three shillings, if three, three shillings and six-pence, because the charge of the subpœna ought for reasons aforesaid to swell in proportion to the number of the defendants. And if there was but one in it, it was two shillings and six-pence before the stamps increased it.

Where many Plaintiffs.

Where there are many plaintiffs they need not all be named, but only *A. B. * et al.* since that is sufficient notice to the defendant to appear, for the appearance to *A. B.* will be appearance to the rest.

If the label and body of the subpœna don't agree, it is no good service, and it is no contempt not to appear.

The label is a short copy of the import of the subpœna, as it relates to each particular defendant; therefore, if the label and body do not agree, the party served may take advantage of it; for it is no contempt in the party not to appear if he be not served with the subpœna itself, or a true copy of it: and the label is not a true copy of the subpœna, if it doth not agree with the writ itself.

If defendant is to appear there must be a subpœna left with him or a true copy, but when only interlocutory orders, it is enough to shew such orders.

As to copies, it is to be known that when the defendant is to appear, there must be a subpœna left with him or the copy of it. But when there are only interlocutory orders in a cause, then 'tis enough to shew the orders, and that is notice sufficient. For the clerks of the court are supposed to be residing in court, and therefore upon notice of such orders in a cause, they may consult the original in the minutes. But if the orders direct

* And others.

notice, some have said they must leave copies.

The service of the subpœna, if it contains one defendant only, is by delivering the body of the writ, first to the party himself, and this is a personal notice. Secondly, by leaving it at his dwelling house, with one of his family; or if he hath no house, at the last place of his usual residence. And this was held a good summons at law, in a writ of debt and in all real actions, as may be seen in *Booth* of actions, because it was presumed, that a man must have notice of it in his usual place of abode, and if such notice should not be sufficient, it would be easy by keeping out of the way to escape the extraordinary jurisdiction.

How subpœna must be served.

Where service on first defendant's lodgings not good he having left them a year before the service.

2 Vern. 369.
Eq. Abr. 73.
pl. 17. 351.
pl. 5.
Pre.Ch.99.

If a defendant can't be found, so as to be served personally, or has no certain dwelling, or is beyond sea, service on his attorney or clerk in court good. *Prax. Canc.* 4.

If there be more than one defendant in the subpœna, you must deliver the label to the first, and shew him the body, so to the second, and reserve the body for the last, because the label will not appear to be a true copy unless the seal of the court appear on the body; and unless the seal appear, which is the ensign of the authority, no man need pay obedience to the meer written label.

If the subpœna be against husband and wife, and either the husband or * wife alone be served, 'tis good service of the other, because they are the same person, their property is the same.

Service on either husband or wife good, service on both.

* Query, Whether service on the wife is good service on the husband in chancery, tho' it be so in the exchequer.

same

same, and therefore in a cause here against husband and wife, if one be served, 'tis presumed to be a sufficient notice to the other; and tho' the husband appears, yet for want of an appearance for the wife, an attachment will issue against both, inasmuch as it is a contempt in both, if the wife does not appear as well as the husband, since the husband ought to take care to order an appearance for his wife. *Cary. 76, III.*

Subpœna served on a defendant in England ordered to be good service on the other beyond sea, and why.

If two persons commence a suit beyond sea, to arrest the plaintiff's goods at *Leghorn* by order of court, the service on one defendant here may be service on the other beyond the sea; for both joining in the suit beyond sea, are looked on in the cause but as one person, and by consequence they are to be looked upon here but as one person, they being in this matter the same in interest. *Love v. Baker, Chanc. Cas. 67. Nels. Chanc. Rep. 103.*

When subpœna must be served.

The subpœna must be served before noon of the last day of the return. For after the return day it cannot be served, because that is the time for appearance; and it cannot be a contempt not to appear when you have no notice to appear, till by the mandate of the writ you ought to be in court. And it must be served before noon of the last day of the return, for the Six Clerks sit but till noon, and then strike the time in their books, and the afternoon is reckoned into the next day; for by the antient accounts of the jurisdiction of courts, the juridical time was only in the morning.

The

The service is good in the night, or on *Sunday*, if it be before the time of the return; for this being only process of notice, and not to arrest the parties, it can create no disturbance, tho' it be served in the night, or on *Sunday**.

When the service good in the night or on Sunday.

If injury be done on the party that served the process in word or deed, or the authority of the court contemned, upon affidavit and motion, the party shall be committed to the *Fleet* by attachment, for it is against the dignity of the court to suffer such contempt. And the rather, because the process is executed by private parties, and not by public officers; for no private man would serve the process if he was not to be vindicated from obloquy and contempt.

Injury done to the person serving the process, on affidavit of the fact, and on motion, the court will commit the party offending.

On *Saturday*, 23^d of *February* 1722, in the case of *Coningsby* and *Price* in the exchequer, it was resolved, that if a man whose place of residence is in the country, be found in town, and there served with a subpœna, he is only intitled to eight days time to answer, and not intitled to a † *dedimus* to answer in the country, because the time for answering depends upon the place where the subpœna was served, for no man can gain to himself a new privilege by his change of habitation, after the subpœna served.

A person that resides in the country is found in town and served with a subpœna, he has only eight days to answer.

The range of the court of chancery, for a subpœna returnable immediate, is ten miles, but that of the exchequer fifteen miles; and the reason was because the chancery was ambulatory with the King wherever he was, but

The range of the court of exchequer for a subpœna immediate greater than the chancery, and why.

* Quære, Whether regular by the modern practice.

† Commission.

the court of exchequer was settled at the receipt at *London*, and therefore the court of exchequer took a further range within the compass of the settled jurisdiction, than the ambulatory court did.

C H A P. IV.

Of the original bill.

- W**E come now to the libel.
- Maranth 308. And the modern libel of the cano-
nists is formed from the libel, the positions,
and the articles thrown into one and now call-
ed * *libellus articulatus*, for dispatch; for so
many acts are not now necessary, as were of
Maranth. 265. old, when the † *litis contestatio* was before the
prætor, and the positions and articles before
Gail. 112. the judge; and in this libel they conclude with
§ *clausulæ salutares sive salvantes*, which pray
relief of || *omni meliori modo*. To this libel,
if the defendant puts in a negative answer,
which is now reckoned a sufficient † *litis con-*
testatio to proceed to proof upon; tho' an-
ciently, the manner was for the plaintiff to
come in, and briefly affirm his libel, by way
Gail. 132. of replication.
- Bill the same
with the cano-
nists libel. With us the bill is the libel, and the pray-
ing of general relief, according to equity and
good conscience, is in nature of the salutary

* The articles of the libel. † Contesting of the suit.

§ Salutory or saving clauses. || Taking every better
method.

clause, and the narrative part of the bill is in nature of the positions, and the interrogatory part, in nature of the articles, and the prayer of relief is after the manner of the ancient libel.

When the answer comes in, that is the * *litis contestatio*, in relation to the bill, but What *litis* the replication contests the answer, for it avers *contestatio*. the bill to be true, and denies the answer; but if no replication be filed, and the cause Where no re- be set down upon bill and answer only, the plication is fi- answer stands for truth, because if you don't led and the reply to the answer, there is no * *litis contesta- cause set down tio* in relation to it, and then it must be ad- upon bill and mitted to be true; so if you file a replication answer only, and don't serve a subpoena to rejoin, and on the answer stands for such subpoena to rejoin, move that the de- truth, fendant may examine his witnesses within a definite time, or at least move without a subpoena to rejoin, that the defendant may examine witnesses within a definite time, or that the cause may be set down upon the pleadings; if neither of these ways be taken, and the cause be set down upon bill, answer and replication, the answer must be likewise taken to be true; because you don't assign a probatory term to the defendant, and the re- Replication a- plication alone is not a proper * *litis contestatio* lone no *litis* of the answer, unless you join issue, by assign- *contestatio* of the answer. ing a probatory term, to the defendant. Unless, &c.

When the † *reus* was brought in to answer, Cross Bill. he was said to be convened, which they call § *conventio*, because the plaintiff and defendant met to contest; and since the defendant might likewise have demands against the

* Contesting of the suit. † Defendant. § Convention. plaintiff,

plaintiff, he had liberty to exhibit a libel against him also, which they called * *reconventio*.

If the * *reconventio* came in before the † *litis contestatio*, then both causes went § *pari passu*, and the same probatory term was assigned to both, and the same time given for publication; but the defendant was to answer on the || *conventio*, before the plaintiff was to answer on the * *reconventio*, because the plaintiff first brought the defendant into court to answer his suit, and the defendant's * *reconventio* was only a superstructure upon it. But if the * *reconventio* comes in after the † *litis contestatio*, there both causes do not go § *pari passu*; and therefore it does not stop the plaintiff in the examination of his witnesses; but if the plaintiff be in contempt for not answering on the * *reconventio*, there he is stopt from proceeding on his own || *conventio*, for he can't proceed in that court, when he has gone out of it, and must be attached to answer: but if the * *reconventio* comes in after publication, it will stop the hearing till the plaintiff has contested it; because otherwise, if the defendant has a right, he cannot have a decree upon the plaintiff's libel.

Our cross bill Our law touching cross bills, which is the the same with * *reconventio* with us, agrees in all things with this, for if the cross bill comes in before the reconven- this, for if the cross bill comes in before the reconven- tio of the ca- issue joined, it goes § *pari passu* with the ori- nonists. ginal bill; but if it comes in after issue joined, it can't go § *pari passu* with it, and stops

Curf.Canc.41

* Reconvencion.

† Contesting of the suit.

§ Together.

|| Convencion.

nothing till the plaintiff has incurred a contempt; but if it comes in after publication, it stops the hearing till answered, and the rather with us, because the defendant has a right to the plaintiff's answer upon oath; but if such bill be filed after publication, nothing can be put in issue upon it, that was in issue in the original cause.

No cross bill after publication.

The * *tertius interveniens* is the same with us as the interpleader, which in both laws is when a third person comes to remove either plaintiff or defendant; as if a man as mortgagor brings his bill against the mortgagee to redeem, and another person, who has a right to redeem, prefers his bill against both to remove the first plaintiff, and to redeem from the defendant; so if the mortgagor brings his bill against the mortgagee to redeem, an alienee of the mortgagee, may bring his bill against both to remove the defendant, and to receive the money on the redemption.

Tertius interveniens, or interpleader, first to remove plaintiff or defendant.

Gail. 127.

So a * *tertius interveniens* may come in to assist either plaintiff or defendant, as if there be tenant for life, remainder in fee, subject to a mortgage, and tenant for life, prefers his bill against the mortgagee to redeem, he in remainder may prefer his bill to pay off his proportion; and be let into the redemption. So if there be a rent-charge granted out of lands, previously subject to a mortgage, and the mortgagee prefers his bill to foreclose, the grantee of the rent-charge may prefer his bill against the plaintiff, to come in and assist the defendant, by tendring of the money, and to

* Third intervening party.

save the estate, out of which his rent-charge is to come; but then the * *tertius interveniens* must not collude with either, for he cannot intervene by collusion, to embarrass another man's suit.

What to be done on preferring an interpleading bill.

Pract. Reg. in Ch. 39.

It must come in before the decree.

Gail. 128.

Where plaintiff makes the *tertius interveniens* defendant, he must dismiss his bill by the rules of court.

Gail. 134.

There are other bills of interpleader likewise, as when two persons claim the rents of tenants, there the tenants may prefer an interpleading bill against both of them; but then they must not only file an affidavit that they do not collude with either of the parties, but also bring the rents into court; for unless there be a stake in a court of equity, they will not hinder the claimants by their injunction, from proceeding at law.

The * *tertius interveniens* must come before the decree, or else it is discretionary in the court, whether they will stop the execution of it; and they never do, where it can be made appear, that the party knew that the cause was in contest, and yet stood by without claiming; for then, after a decree, such interposition is presumed to be malicious, in order to hinder the sentence.

When the plaintiff can, and will make the * *tertius interveniens* a defendant, and thereby answer all the purposes of his bill, there such third defendant will be obliged to dismiss his bill, by the rules of the court.

By the canon law the libel can't be amended † *post litis contestationem*.

This rule was exceedingly strong in the old civil law; for the § *litis contestatio* being be-

* The third intervening party.
the suit. § Contesting of the suit.

† After contesting

fore the prætor, the judge had only a commission to hear that cause; and he could not alter or change it, and therefore he did not take the * *judicium* to be † *ceptum* till the § *litis contestatio*; but after the § *litis contestatio*, they were supposed to be under || *quasi contractus*, to submit to the sentence, because they received the judges by agreement of both parties from the prætor.

And tho' there was the same judge both for the § *litis contestatio*, and the sentence in the canon law, yet they allowed the time for forming the libel to be only ** *ante litem contestatam*, and that †† *post litem contestatam* it comes too late; for that would be to make another cause, which is not in contest.

It is so with us, for a plaintiff may amend his bill before issue joined, that being the time for him to form the cause of complaint, and therefore he cannot have a supplemental bill before issue joined, because the first cause was but §§ *in fieri*; but after issued joined, he may file a supplemental bill with leave of the court, because the first is closed, but not without leave of the court, because he cannot bring a new matter into the same cause, so as to make it a part of it, without permission of the court.

* Judgment. † begun. § Contesting of the suit.

|| As it were an agreement. ** Before the contesting of the suit. †† After the contesting of the suit.

§§ In being.

E

EXCEP-

EXCEPTIONS,

Exceptions
are three-fold. Are three-fold, declinatory, dilatory, and peremptory.

The first, are such as decline the jurisdiction of the judge.

The second, are such as delay suits by exceptions to the person of the * *actor*.

The last, are such as † *perimunt jus agentis*, as a release, or former suit for the same matter determined, &c.

Maranth. 280.
tit. except.
Corv. Digest.
lib. 44. de
except.

The declinatory and dilatory exceptions, are regularly put in § *ante litem contestatam*, for they were before the prætor, as reasons why he should proceed in the cause to give judges.

But the peremptory exception might as well be put in before the prætor, as a reason why he should not give judges, as before the judges to preclude the plaintiff from all right of action; and the method was, that if the peremptory exception was proved exceeding clearly before the prætor, he proceeded no further in the cause; but if the peremptory exception was doubtful, either in point of law, or matter of fact, then he remitted it to the judges to determine it; since it was then proper, that it should be put in judgment.

What are cal-
led exceptions
with us.

We have likewise exceptions, which with us, are called either demurrers or pleas.

First, of the declinatory, and that is either a demurrer for want of equity in the plaintiff's bill, or because his proper proceeding or re-

* Plaintiff. † Are a bar to the plaintiff's right.

§ Before the contesting of the suit.

medy was at law. First for want of equity in the plaintiff's bill; and this is properly a declinatory plea, because it hinders the plaintiff from proceeding * *in foro prætorio*.

The second exception declinatory, is, that ² Mod. 173. the plaintiff's remedy is properly at law; and this is either, where the plaintiff proceeds upon a certain demand, as upon a note or bond, or the like; there if the defendant denies the note or bond, he may demur to the relief; because he is entitled to try the validity of the bond or note, by a jury; but if the defendant confesses the note or bond, there he cannot demur to the relief, because admitting the debt, he ought to pay it, and not proceed to litigate it in either † *forum*. But if the plaintiff comes in upon any deed into a court of equity, the defendant need not answer to the deed, but may demur to the bill, unless there is an affidavit of the loss of it, or unless the bill be merely for the discovery of it, to supersede the necessity of proof at law; for whether it be the defendant's deed or not, is only determinable in an issue at law; because there was a fine to the King upon the defendant's denying his deed at law, if it was proved upon him.

Ch. Caf. 11,
231.
Vern. 59, 180,
247, S. P.

Whenever a man proceeds upon a bond or covenant for a sum certain, and don't annex an affidavit to his bill, it is a good cause of demurrer; because whether it is his deed or not, is properly determinable at law; where, upon such issue as hath been said, if it be found against the defendant, there is a fine to the

When affidavit necessary
to be annexed
to a bill.

* In the prætorian court, or court of equity. † Court.

King; but if the defendant, without taking advantage of such demurrer, for want of an affidavit, confesses the deed in his answer, there he can't demur to the relief; because, confessing the deed, it is iniquitous to litigate it upon the issue of * *non est factum* at law; and therefore he has nothing to do but to pay the money, for it is contrary to conscience to contest it at law; but if he denies the deed, he may demur to the relief, because he has a right to have it tried by a jury, whether it be his deed or not; but if an affidavit be annexed of the loss of the deed, there, if he denies such deed, he can't demur to the relief, because the relief is in equity, and not at law, for the plaintiff can't make his proof at law, without the deed itself, but he may make his proof in equity how the deed was lost or burnt, and proceed against the defendant for payment of the money.

When no affidavit necessary.

But if upon the deed there is no relief at law, as if it be upon a trust, which is only determinable in equity, or for a specific execution of a covenant, there the plaintiff need not annex an affidavit to his bill of the loss of such deed, nor will a demurrer be allowed for want of such affidavit, because his relief is not † *in alieno foro*, and he could have no relief in a court of law upon such deed.

3 Ch. Rep. *6.

2 Ch. Caf. 11,

231.

Vern. 59, 180,

247, S. P.

But a distinction has since been taken, that if a bill be brought for discovery of writings in general, no demurrer can be to such bill for want of an affidavit annexed, but if a bill be brought for the discovery of a particular deed

* Not his deed.

† In another court.

or

or bond, for which there is a proper remedy at law, then they must annex such affidavit to the bill, tho' it be but for discovery, because otherwise, the answer would be but an unnecessary expence.

The second sort of demurrer is where a When defendant may demur to the bill.
 plaintiff goes into a court of equity, for damages which are uncertain, and not to be settled but by a jury, there the defendant may demur to the relief, after having first answered to the damages, because it is * *alieni fori*, since the court can't settle the damages: But this must be † *ante litem contestatam*, for if he answers and contests with the plaintiff, there he can take no advantage of it at the hearing; for he has submitted to the jurisdiction of the court, and the court will try at law the quantum of the damages, by a feigned action of § *quantum damnificatus*; so on the demurrer † *ante litem contestatam*, if the plaintiff will go on for the damages confessed, the court will retain the bill || *quoad* those damages, allowing the demurrer as to any further relief.

Secondly, The dilatory exception, and that Gail. 134.
 is either the plea of outlawry, or excommunication, or demurrer for want of proper parties.

As for outlawry and excommunication, they The plea of
 must be pleaded † *ante litem contestatam*, for outlawry.
 after answer, the defendant admits the plaintiff a proper person to be answered to, and therefore such plea would then come too late; but

* Another court's jurisdiction. † Before the contesting of the suit. § How much damage sustained. || As to.

How to be
pleaded.

In what cases
defendant
need not set
down his plea.

Outlawry in
executors, &c.
no good plea.
Gilb. Hist.
Com. Pleas
159.

Demurrer for
want of proper
parties.

if an outlawry be not pleaded, yet it may be shewed at the hearing, as a peremptory matter against the plaintiff's demands, if it be personal; because it shews the right of the thing in demand, to be in the King; and so in the canon law, an excommunication might be shewed at the hearing, because it is in the nature of an outlawry with them; but in this case, the defendant need not set down this plea, as he must other pleas and demurrers in eight days, or they will stand over-ruled, but the plaintiff must set it down if there be any insufficiency in point of form in pleading it, for being * *sub pede sigilli*, it appears upon shewing to be a good plea, and therefore is not presumed necessary to be argued before the court; but if the bill be for relief against an action at law, and outlawry be pleaded by the defendant in the same cause, it is a bad plea, because the outlawry is part of the grievance, and it is † *exceptio ejusdem rei cujus petitur dissolutio*. *Jenk. Cent.* 37. Outlawry in executor, administrator, or guardian, or prochein amy, is no good plea, because they do not claim in their own right, and the real § *actor* being the testator, or infant, the outlawry in any third person, is no exception against him, why he should not || *stare in judicio*.

Secondly, A demurrer for want of proper parties, is an exception as to the defendant brought into court, for if there be not a proper defendant before the court, there can be no decree, and therefore this is an objection as well a-

* Under seal. † An exception to the same matter from which a discharge is sued for. § Plaintiff.

|| Be admitted to sue.

against

gainst proceeding, as at the hearing, for the defendant can't be obliged to contest, where there can be no proper parties for a decree, but such proper parties being added, the defendant may proceed.

Thirdly, The peremptory plea.

The first is * *lis pendens*, which is a bill in Third excep-
 another, or the same court of equity, for the tion.
 same cause, and this is certainly a good plea,
 and need not be set down, and therefore the
 only question is, whether it be a true one; and
 so the trial of the fact, is to be referred to a
 master to certify, whether they be one and
 the same bill, or to the same purpose, and
 then the bill must be dismissed, unless the
 plaintiff obtains leave of the court to dismiss
 his former bill, and retain his second; but in
 that case he must pay the costs for dismissing
 his former bill, and for the plea as if allowed.

The defendant can't plead a suit depending Defendant
 at law, in bar of the plaintiff's demands in can't plead a
 equity; because the plaintiff has a right to the suit depending
 defendant's oath in equity, to exonerate him at law in bar
 of the † *onus probandi* at law; but after the of the plain-
 answer is come in, the defendant may put the tiff's suit in
 plaintiff to his election, either to proceed at equity, but
 law or in equity; that he may not be doubly after answer
 vexed. put in, may
 oblige the
 plaintiff to
 make his elec-
 tion.

The next peremptory plea is, that the mat-
 ter has been already decided or decreed in a
 court of equity, and this is a good plea, because Second pe-
 what has been already adjudged, is not to be remptory plea.
 afterwards drawn into controversy; and if

* A suit depending. † Burthen of proof.

If decree in-
rolled, a pro-
fert may be
made of the
record without
swearing the
plea, but if
not, must be
sworn.

Judgment at
law no bar to
a suit in equity.

the decree be inrolled, they may make a pro-
fert of the record, without swearing the plea,
because the record itself is exhibited, to which
there can be no addition by the defendant's
oath; but if it be in paper, so that it cannot
be shewn to the court, there the plea must be
on oath, as in other cases*; but a judgment at
law is not to be pleaded in bar to a suit in
equity; tho' my Lord *Coke* and the common
lawyers contended with my Lord *Elsmere* that
it should, and that therefore the court of
equity should not injoin after judgment; but
this was at last determined in favour of the
chancellor, by a reference of the King to the
attorney and solicitor general, that such a plea
of a judgment at law should not be allowed;
for the judgment might be obtained contrary
to conscience, and then the plea of such judg-
ment would be, † *exceptio ejusdem rei cujus peti-
tur dissolutio*. Jenk. Cent. 37.

Third pe-
remptory
plea.

The third peremptory plea is the stated ac-
count, and if fraud be objected to such ac-
count, and to the stating of it, and all the cir-
cumstances of fraud be answered and denied,
such stated account may be pleaded, for that
is not an † *exceptio ejusdem rei cujus petitur
dissolutio*. For that which should destroy
such stated account is the fraud, and that
is denied, and therefore, such stated account
stands proper to be pleaded against any
unliquidated demand; for otherwise, no man

† An exception to the same matter from which a dis-
charge is sued for.

* See fol. 12, of the jurisdiction of the court of chan-
cery vindicated at the end of the first part of Chancery
Reports, folio edition, where you will find this reference at
large; and see also Cary's Rep. 115.

would

would be safe in stating his account, and delivering up his vouchers, touching the particulars; and therefore, the plaintiff who has the vouchers delivered up to him, which always ought to be part of the plea, ought to assign error in the account, which it is supposed he is able to do, having the vouchers in his hands, whereby to make out such error.

The pleading of a release is likewise a peremptory plea, but the defendant must set out the valuable considerations upon which such release was made, otherwise fraud will be presumed; for there can be no greater badge of fraud presumed, than that the plaintiff should part with his property for nothing, and all other circumstances of fraud must be denied; when a release is pleaded, it must always be under seal, otherwise, it is to be pleaded as a stated account only.

The fourth peremptory plea, is that of a purchaser for valuable considerations, without notice, and here you must plead, that your vendor was seised in fee, or that you believe and are advised that he was so at the time of the purchase; for if it be charged in the bill, that the vendor was only tenant for life, or tenant in tail, and a discovery of the title be prayed, you cannot cover such discovery, unless you swear a seisin in the manner already mentioned, or that such fines and recoveries were levied and suffered, as would bar an in-tail, if he was tenant in tail; for if you should set forth a purchase by lease and release, that would pass no more from the tenant in tail than

The plea of release.

The fourth peremptory plea.

Ch. Caf. 34.

than it lawfully may pass, and that is only an estate for the life of the tenant in tail; and then there is no bar against the right of the issue. In the next place, you must set out the purchase money, for if you are not a purchaser for valuable consideration, but are only a volunteer, that is no bar against a discovery; you must likewise plead the deeds of purchase, setting forth the dates, parties, and contents briefly, and the time of their execution, for that is the peremptory matter in bar; and you must deny notice in the plea, otherwise you do not make it a complete equitable bar; for if you had notice of the title, tho' you paid value for it, you are not a conscionable purchaser; and you must likewise deny notice in your answer, for that is matter of fraud, and cannot be covered with the plea; and it must be denied in the plea, because otherwise, there is not a complete plea in court on which the plaintiff may take issue. But all these pleas with us are to be put in * *ante litem contestatam*, because they are pleas only why you should not answer, and therefore if you answer to any thing, to which you may plead, you over-rule your plea; for your plea is only why you should not contest and answer, so that if you answer, your plea is waved; but you may answer any thing which is not charged in the bill, † *in subsidium* of your plea, as you may deny notice in your answer, which you deny also in your plea, because that is not putting any thing in issue, which you would cover by your plea,

When peremptory pleas must be put in.

* Before the contesting of the suit. † In aid of.

from

from being put in issue; but it is adding by way of answer, that which will support your plea, and not an answer to a charge in the bill, which by your plea you would decline.

Arnold's Case, 30th May 1723, in the Exchequer.

Plaintiff's lessee brought a bill against the heir and executor of the lessor, to establish his lease, suggesting that such heir claimed by a marriage settlement, and to have recompence on the covenant for further assurance out of the assets; the defendant pleaded the marriage settlement, to which the ancestor was only tenant for life, with a remainder to him in tail, with a power in the ancestor to make leases at the best improved rent, and demurred to that part of the bill, that prayed relief out of the assets, because it was matter determinable at common law, and founded only in damages; but the plea, tho' allowed to be good in substance, was over-ruled, because it was pleaded in bar of what was afterwards answered unto, which covers that part which he submits to answer unto, from all manner of exception; even if the answer was equivocal and defective, therefore, the plea, tho' good in substance, was informal, and the demurrer was bad, because it covered the answering of the assets, and likewise the making a compensation by way of specific performance, which was the proper business of a court of equity.

The

Danv. 771.

p. 6. 778.

p. 2.

Eq. Abr. 38 p.

8. 334. p. 5.

Chanc. Ca. 34.

2 Freem. 175.

The notice denied in the answer, and the plea, must be a denial of the notice at the time of the execution of the deed, not at any time before; for if the purchaser had notice before the execution of the deed, he ought not to have proceeded in his purchase, and he ought also to deny notice at the time of the purchase money paid, if such notice be charged on him by the bill; for tho' the deeds be executed, he ought to have held his hand and not paid his purchase money, with notice of another's right, but the payment of the purchase money, is the last period of time, in which notice can affect a purchaser.

If tenant in tail makes a mortgage or conveyance for valuable considerations, and afterwards gives the deed of intail into the hands of the mortgagee or purchaser, or the heir in tail takes up more money from the mortgagee, and delivers him the deed of intail; here if the heir in tail exhibits his bill to have the deeds of the defendant, tho' he cannot plead, that the mortgagor or vendor was seised in fee, because it appears by the deed of intail, that he was tenant in tail only, yet he may say by answer, that the mortgagor or vendor pretended to him, that he was tenant in fee, and that he believed, and was advised so at the time of the mortgage or purchase; and insist that he should not be obliged to deliver up the deed to the plaintiff, or to discover, whether his ancestor was tenant in tail or not; but if the ancestor was tenant for life, with a remainder to the son in tail, upon a marriage settlement, and made a mortgage, and he in remainder makes a second mortgage, and delivers the deed, he shall not be obliged

to pay off the first, but the mortgagee must discover the title, and deliver up the deeds upon payment of the second mortgage only; and the reason of the difference is this, that the tenant in tail being master of the estate, is likewise owner of the deed, and therefore, having pledged the deed as well as the estate for money, the issue in tail cannot have the aid of a court of equity, to have up such deed, unless he pay the money; but in the case of the tenant for life, there he had only a particular property in the deed, and was not master of the estate, so as to bar it, and therefore the court of equity will make him deliver the deed to the person who was the prior purchaser upon valuable considerations, that is, the remainder man in tail.

Fifthly, The (a) statute of frauds and perjuries, and that (b) of limitations, are peremptory pleas; but in pleading the statute of limitations, a man in his answer must say, that he has paid his money, because otherwise a court of equity supposes a trust, between the plaintiff and the defendant, and that the money is a * *depositum* in the hands of the defendant, for the benefit of the plaintiff, and the statute of limitations does not reach trusts.

Sixthly, The plea of fine and nonclaim, and here it is first to be observed, that such plea will bar any title in equity, as well as at law, and is a good bar thereunto; as if A. has lands in trust for B. and C. enters upon him, and levies a fine with proclamations, this will be a good bar to B. the cestui que trust, as well as to A. the trustee; because they are both within the same statute, for C. has an opposite

The fifth peremptory plea.

(a) 29 Car. 2. c. 3.

(b) 21 Jac. 1. c. 16.

Statute of limitations does not reach trusts.

Plea of fine and nonclaim.

Thynn v.

Cary, Danv.

760. p. 9.

Jones 416.

Salisbury v.

Baggot.

Ch. Cas. 278.

* Deposit.

2 Freem. Rep. title both as to the trustee, and cestui que trust,
 21. and there was no greater wrong to a cestui que
 2 Inst. 518. trust, than to him who has the legal interest in
 Gooderick v. him, for a disseisin ousts them both, and yet
 Brown. Danv. 761. p. 5. for the repose of men's inheritances, a fine
 Eq. Abr. 255. and nonclaim bar them both, but then C. must
 P. 1. deny that he claims from A. or if he does
 Ch. Ca. 49. claim from A. he must deny that he had no-
 2 Vern. 56. tice of a trust for B.

For if C. claims from A. there are two cases, in which the fine and nonclaim would not bar.

Vern. 93. First, If the fine was levied from A. to C. without consideration, there since A. was under a trust, his conveyance to C. was under the same trust; so if A. levies a title to C. and C. hath notice of the trust to B. there the fine and nonclaim is no bar; because the conveyance by the fine is under the same trust, and therefore can't be set up as a bar to it; so that whenever any person is charged as claiming under the trustee, he must either set up his opposite title, or deny his claim as trustee, or else, if he claims under the trustee, he must set forth the consideration, and deny the notice, to shew that his fine was not forfeited by the trust, for if it was, the fine and nonclaim can be no bar.

So it is when a man claims under a conveyance, obtained by fraud, it only gains a legal title, and a trust arises to the right owner, to whom restitution ought to be made; and therefore if such purchaser by fraud, levies a fine with proclamation, such fine is no bar, because he himself held the estate under a trust to restore it to the right owner, and

the fine itself is no more than a corroboration of the title, which was under the trust, and not an opposite title to it.

So if he, who comes in under a fraudulent conveyance, sells by fine for a valuable consideration, and without notice of the fraud, it is an opposite title, and the fine and nonclaim may be set up as a bar.

But if he sells by a fine without consideration, or with notice of the fraud, tho' upon consideration, the trust still continues; and therefore, where a man is charged to claim under a fraudulent conveyance, if he pleads a fine and nonclaim, he must in this case likewise, either deny his claiming under the person committing the fraud, or if he does claim under him, he must set forth, that he comes in for valuable consideration, and without notice of the fraud.

Secondly, If the equity or trust be created by the fine, that fine and nonclaim shall never bar the equity that it created, for this is not an opposite title, but a title created by the fine, so that it can't bar the trust that was annexed to it, and under which trust the cestui que trust held it. Ch. Ca. 278.
Salisbury v.
Baggott.

If a man answers all the allegations of the bill, he cannot demur to the relief; because he has put all the allegations in judgment, and each fact is contested by his answer; and therefore the relief, which is but a consequence of those facts cannot be demurred to, but are proper to be determined at the hearing. When the relief of a bill can't be demurred to.

The

The exception is, among the civilians and canonists, * *loco responsionis*, and so among us, the plea comes in instead of the answer, to so much as it covers, and therefore must be over-ruled, before the defendant is to answer, because he is not to contest in the cause, as to that matter, which he covers, while he insists that it is not to be put in issue; and therefore, where the plea is informally pleaded, and yet is a good cover in equity to a part of the bill, the court often reserves the benefit of it to the hearing; and then that part of the bill which is covered by such plea, is not to be answered.

You may not plead and demur at the same time to the bill, on the same point of the bill; because if the demurrer be over-ruled, the defendant must answer, and can't have the benefit of his plea; for the court upon over-ruling his demurrer, does of course rule that the defendant should contest and answer.

C H A P. V.

The other process of the court, and of process against peers.

THE bill was originally before the issuing of the subpœna, and was a petition for it.

* Instead of the answer.

And there being a deviation from this practice, that proved burthensome to the subject; 'tis enacted by the statute for the amendment of the law, that no subpoena or process for appearance, should issue till after the bill is filed, with the proper officer, in the courts of equity, unless in case of bills for injunctions to stay waste, or to stay suits at law, and a certificate thereof, brought to the subpoena office, under the hand of the fix clerk.

4 & 5 Ann.
cap. 16. sect.
22.

No subpoena
unless, &c. to
issue till bill
filed.

The subpoena is to attend the extraordinary jurisdiction, to answer the complaint of the bill; and not to appear at the return of the subpoena, is a contempt of that jurisdiction.

Subpoena to
attend the ex-
traordinary
jurisdiction.

About the 16th of *Elizabeth*, they introduced the practice of writing letters to the peers, before they issued a subpoena, upon presumption that a peer would pay obedience to the mere letter of the chancellor. Or else it was founded upon a respect that they thought due to the peerage, engaged in public affairs, that they should have notice before the process issued. Especially because having a numerous attendance, it might be inconvenient, that they should incur a contempt from a process served in the common method, by leaving it at their houses with one of their servants.

When letters
to peers were
first introdu-
ced, and why.

If a lord doth not appear upon the letter, a subpoena upon motion is to be awarded against him, because no subsequent process can be formed but upon a contempt to the great seal, which is the royal authority, and the contempt will not arise merely from the

F

chan-

chancellor's letter, which is * *ex gratiâ*, and therefore if he did not appear on the letter, the subpoena issued. 3 *Selden* 1543. 2 *Vent.* 342. *Danv. Abr.* 776.

If on the service of the subpoena the peer doth not appear, or if he did appear, and did not put in his answer, they antiently issued an attachment, but the attachment was condemned in the 14th of *Elizabeth* in parliament, and resolved that no attachment lay against the person of a peer, because his person cannot be imprisoned. After that they proceeded against peers by sequestration, and therefore the motion is for a sequestration unless cause. And this was regularly made upon affidavit of the service of the letter and subpoena. Tho' sometimes it is moved without: since the peer may shew want of service at the day assigned to shew cause why the sequestration should not issue. And the order for the sequestration is never made absolute, without an affidavit of the service of the order, to shew cause, and a certificate of no cause shewn.

A bill being filed against a peer or peers, the first application is for my Lord Chancellor's letter missive not in term time, or it may be immediate, (if the peer or peers live in town) but in this case there must be an affidavit, that the original letter is left with the peer, or at his house, with the copy of the petition as answered, and therewith is also left an office copy of the bill, signed by the fix clerk, (for if the bill is not signed, the service is irregular.)

* Out of favour.

This

This letter is only a compliment. It is not process to found proceedings upon, and the peer may appear or not, as he pleases upon service of the letter; if he appears it is well; if he fails a subpoena is sued out against him, and his time for appearing and answering being out, an attachment must be actually sealed and entered against him, (tho' never executed) to ground a sequestration upon. It is a motion of course for a sequestration, upon an attachment for want of an answer, the peer must be personally served with this order, and he hath eight days to shew cause, after personal service of the order, if no cause, the order is absolute, but if the sequestration is for want of an appearance, and he appear, the plaintiff must run the same race over again for want of an answer, and the peer must pray time to answer as other suitors do, tho' he is generally in a worse case, because of privilege, (especially where it has been stood upon). The same proceedings are had against a member of the house of commons; there the party proceeds by way of sequestration, only with this difference, that instead of a letter, there is always a subpoena sued out; and when a cause either against a peer or a commoner stands in the paper, and is called and the court cannot proceed, (privilege being in) the court never strikes it out, as they do in other cases, where the party is not ready, they let it stand over from one term to another, till privilege is out, and never put the party to issue out a new subpoena to hear judgment, and the direction of the court to the register, generally is, to put all privileged causes (which have

2 Chan. Ca.

163.

been put off on that account) the very first causes in the paper, when the court sits after privilege is out, and if this should be otherwise, it often falls out that the plaintiff, (where the peer or commoner makes default at the hearing) cannot make his decree absolute, till the coming in of privilege a second time, which the court always takes care to avoid.

When defendant is discharged with costs.

If in an injunction-cause, where the subpœna issues before the bill filed, if the bill is not filed on the third day after the return of the subpœna, the defendant is discharged with costs, because there is nothing for the defendant to appear to answer to, and therefore he must be discharged from his attendance, with the costs that arise from such unnecessary vexation.

The costs usually taxed are ten shillings, unless upon affidavit, the court think fit to refer it to a master, by reason of any extraordinary charge and trouble arising to the defendant: and for such costs the defendant may have a subpœna commanding payment. For tho' the plaintiff hath abused the process by taking out the subpœna without bill, yet he shall not be forthwith attached as for a contempt, because the original subpœna is presumed to issue upon a bill filed, and therefore since the court thought fit * *ex gratia*, to relax that practice, the plaintiff is not in contempt till he disobey the order which commands him to pay costs, and by consequence he must have notice of that by a subpœna.

The original subpœna is a summonce to the party himself that is defendant, wherefore not

* Out of favour.

to appear thereto is justly accounted a contempt of the court. And in such case, an attachment issues to the sheriff to take him up. In this the chancery process differs from the process at common law. For there the writ, or common § *capias*, which is in the nature of a summonce, is directed to the sheriff, and the sheriff antiently made his return upon it, either * *summoneri feci*, or † *nihil habuit in balliva mea per quod summoneri possit*; here the plaintiff makes affidavit of the service of the subpœna, and files it at the affidavit office; and then the attachment issues of course under the great seal. Because the summonce is in nature of an order to attend the extraordinary jurisdiction, and all other processes issue on a supposition of disobedience thereunto; but if the summonce had issued to the sheriff, it had been only a contempt shewed to a ministerial officer in not paying obedience to him, and not to the court itself. Besides at common law if a writ were directed to the party himself, that might have been smothered, and it would not have laid any foundation for any other court to proceed upon it. But when the power of the justicier was broke, they gave the chancery a power to issue the writs, and the other courts authority to proceed upon them, and therefore these were necessarily directed to the sheriff, that they might be returned to the other courts. But in the chancery and exchequer where the same courts

§ A writ so called from the word *take*, the emphatical word in it. * I have summoned. † He had nothing in my bailiwick whereby he could be summoned.

issued the process, where the appearance was to be, the first process was directed to the party, that it might be left with him, or at least a copy of it, to make the party more ascertained of the time of his appearance.

When the subpoena is served, and affidavit made of it before a master in chancery, or before a baron in the exchequer, if the party does not appear, an attachment issues of course, but if the party appear, they must shew the affidavit to the clerk in court, and if the answer don't come in, then an attachment issues of course.

2 returns on an attachment. Note; if the sheriff does not make his return he shall be amerced. Cary's Rep. 44, 77, 78.

Upon an attachment there are two returns, either * *non est inventus*, upon which the proclamation issues of course, or † *cepi corpus*; if † *cepi corpus* be returned, the next step is to move for an § *habeas corpus*, to bring up the body, if he will not answer below, for the sheriff has executed the command of the writ of attachment, by taking the body, and he cannot carry him out of the county, without the command of the King; and if he should carry him out of the county, without the King's writ, it would be an escape upon the § *habeas corpus*; they amerce the sheriff if the body be not brought in. But in *London* and *Bristol*, where the fines and amerciaments belong to the corporations, they immediately move for a messenger, and this messenger being the immediate officer of the court, takes the body by order of the court,

* Is not found. † I have taken the body. § Have the body, a writ so called, because those words, *have the body*, are an emphatical part of it.

without

without making the sheriff liable to an escape, upon the King's writ, because he is removed by order of the court, and in possession of the court, by it's messenger.

In the exchequer there is a rule given of four days to bring in the body, that the defendant may do it at his own charge, if he pleases, by an * *habeas corpus*, purchased by himself, and if he don't remove himself within those four days, then a messenger will be awarded upon motion, and this is by a particular prerogative of the court of exchequer, that the plaintiff who is the King's debtor, may not be delayed.

If † *non est inventus* be returned upon the attachment, then an attachment with proclamation issues. An attachment with proclamation.

After a contempt duly prosecuted to an attachment, with proclamation returned, no commission to answer shall be granted, nor any plea or demurrer admitted, but upon motion in court, and affidavit made of the party's inability to travel, or other good matter to satisfy the court touching that delay. After contempt no commission for answer, nor plea or demurrer admitted but on motion in court, and affidavit of the party's inability to travel, &c.

The reason why upon the first contempt on the attachment, they allow a commission to issue, or a plea or demurrer to be put in, is, because it don't appear to be an affected delay, and therefore, upon tendering the costs of the attachment, the defendant may take his commission, and upon like tender, the plea and demurrer are to be received. But if there regularly issues an attachment with

* Have the body, because those words, *have the body*, are an emphatical part of the writ. † Is not found.

proclamation, the defendant cannot of course purge his contempt by a meer tender, but he must apply to the court, to shew that his plea and demurrer are proper, and to exhibit a proper excuse for his delay, that the court may see that there is no further likelihood of delay by the plea or demurrer put in, or by the commission to answer granted.

Note, that the form of the attachment being * *ad respondendum de contemptu per ipsum nobis illatum, et ad faciendum ulterius & recipiendum quod dicta curia consideraverit*, he must answer as well as clear his contempts at the same time. But the usual way is not to take the penalty, which is no more than for the clearing his contempt, till he hath answered. For when the penal sum is received the defendant may reasonably say that the fault is purged, and so there would be no sufficient foundation to retain the party or carry on the process, in case he will not answer; and therefore the usual way is for the plaintiff to insist that the defendant should answer; but the answer will not be received without clearing his contempts.

The attachment at common law was twofold, by the goods or by the body. In all debts the attachment was by the goods, because the debt was only a chattel, and therefore only chattels were liable, and the † *capias* was brought in the action of account by sta-

* To answer the contempt he has been guilty of; and further to do and receive what the said court shall think proper. † See before p. 69, in notes.

tute [*Marl. cap. 23.*] on §§ *nihil* returned on a summonce.

But the attachment by the body was only for crimes, the least of which was against the public peace, or was a contempt of the court, and for these a man's person was naturally liable. For tho' a debt at law made only a chattel liable, because the lender trusted to his debtor's chattels only, yet a crime made the subjects body liable, because the prince was thought to have a property in the body of his subjects, to serve him in his wars, to attend his courts in peace, and to call them to answer for offences against the laws.

The next process is the proclamation. This is a process issuing out of the extraordinary jurisdiction upon a * *non est inventus* returned, commanding the party to appear in chancery † *sub pœnâ legianciæ*. Now where * *non est inventus* was returned on a § *capias* issued in criminal matters, they proclaimed the party, and if he did not come in on such proclamation, he was declared an outlaw. So if he contemned the extraordinary jurisdiction, he was proclaimed, and if he was not taken, or did not come in upon such proclamation, then he was deemed a rebel, and thereupon a commission of rebellion issued, which is the next process.

A commission of rebellion, is a particular commission directed to commissioners, || *conjunctim* and ** *divisim*, commanding that

§§ Nothing. * Is not found. † Upon forfeiture of his allegiance. § See before p. 69, in notes. || Jointly. ** Separately.

* A. B.

Dalton's Sheriff 156.

The proclamation. For the form see Har. Chan. Pract. 297, 298.

* *A. B. ubicunque inventus foret infra regnum Angliæ, tanquam rebellem & legis nostræ contemptorem attachias, seu attachiari facias, ita &c.*

Door cannot be broke open on an attachment, and why.

Difference of the process at the suit of the King or in outlawry, and at the suit of a common person.

3 Danv. Abr. 302. pl. 9.
Moor 668.
Cro. Eliz. 908.
5 Co. 91.
Yelv. 28.
Co. Ent. 12.

It hath been doubted whether upon an attachment or proclamation, the sheriff may break the doors or not. Some have held that the intent of the writ is to go no further than a common *||capias*, and that it would be very inconvenient, that the sheriffs officers that executed common process, should have by this writ an authority to break into a man's house, and that his house should not be a protection to him. Others have held that the writ is *† propter contemptum nobis illatum*, and it being in the King's case, there is no privilege, or protection against the King's process. But the true reason of this doubt, both in *Dalton* and *Crompton*, arises from the not understanding the true nature of process, and the reason of *Semain's* case. For doubtless upon an attachment or proclamation, the sheriff cannot break the doors, and the difference as to this matter is, that where there is only authority in a process, to take the person or levy the debt, the sheriff can go no further, because his writ gives him no further authority; but in the King's case, or in the case of outlawry, there are the words *§ non omittas propter aliquam libertatem*, and therefore such writ gives authority to break the house. Besides that in

* You attach or cause to be attached *A. B.* wherever he shall be found within the kingdom of England, as a rebel and contemner of our law, so that, &c.

|| See before p. 69, in notes.

† By reason of the contempt committed against us.

§ That you do not omit by reason of any liberty.

the

the case of outlawry no man shall receive protection from the law, of which he is declared a violator, and therefore the seising him as an outlaw, doth imply the liberty of entering and seising him wheresoever he lies hid. But it may be asked why in the common case of a contempt, the process was not so formed as to give authority to sheriffs to enter the freehold? The reason is,

First, Because the very notion of * *liberum tenementum* is that the tenant shall be freed by the law from all actual violence. For that cannot be said to be held freely, if the lord that had a right to distrain, or the sheriff that was to serve the ordinary process, had a power to enter by force. And if the lord was not permitted to enter with actual violence, where he had a right to his rent, the sheriff could not be allowed to enter by force to serve the ordinary process.

Reasons why
sheriff on a
contempt can
break open
doors, or enter
freehold.

Secondly, Because in the times when tenures were in their full height, it was thought too severe that the lords that had generally demands upon their tenants, should break into their houses, since the violence of such a process in the first instance might compel them to pay more than was due.

Thirdly, Because the party might be ready and willing to answer the demand, and therefore it is too severe to extort that by violence, when it doth not appear but the party is ready to pay.

Fourthly, The whole process of a county must be served by the sheriff, but the law

* Freehold.

must

must in a case of this kind take notice that it could not be served by the sheriff in his own proper person, and it were too much to lodge such a discretionary power in the deputy of a minister, to violate men's houses in the execution of a process in the first instance.

Note, that the liberty of men's own houses seems to be a matter very much contended for from the Conquest till the settling of † *Magna Charta*. For the Conqueror carried his endeavours to restrain men from the freedom they had been used to in their own houses. And therefore in the times of *Henry* the third, under the protection that the law gave to houses and castles, they used to shelter unlawful distresses, which were therefore inconveniences provided against by the stat. of *Marlbridge* and *Westminster*. 2 *Inst.* 139, 193.

Houses may
be broke open
on a commis-
sion of rebel-
lion, and why.

Dalton's She-
riff 353.
Crompton 47.

Commission of
rebellion issues
to commissio-
ners, and why.

From this digression, we return now to the commission of rebellion. And there it is plain that the commissioners may break open a house, because the words of the writ are, that they shall attach the party * *tanquam rebellem & legis nostræ contemptorem*. And therefore this is within the reason of the process of outlawry. For when you are to take the party as a contemner of the law, the design of the writ is, that he should not be any where protected by the law: And therefore it implies an authority to enter into the house.

And this is indeed the reason why this process is directed to commissioners under the broad seal, and not to the sheriff. Because the sheriff cannot be supposed to execute all

† The great charter.
our law.

* As a rebel and contemner of

such process in person, and it may be inconvenient to trust so great a power with the deputies of the sheriff's nomination: and therefore this court appoints its own commissioners who are entrusted to do every thing very carefully, and are answerable to the court for their miscarriages.

The next process after a commission of rebellion, is a serjeant at arms. And that is granted on the return of * *non est inventus*, upon a commission of rebellion, upon motion in court. The reason why this process is obtained upon motion, is because there is nothing to issue under the broad seal, so that since there is no process under the seal to make it a record of the court, there must be an act of the court to send the serjeant at arms.

But here it may be required, why there must be a serjeant at arms after the return of the commission of rebellion, before a sequestration can issue; and the reason seems to be, because the court will not issue a process upon the whole lands, and goods of the defendant, till one of its own officers see that the defendants do totally disappear. And therefore the return of the serjeant at arms is particularly recited in the sequestration; wherefore the sequestration doth not issue on the return of the commission of rebellion, because the commissioners are of the plaintiff's own nomination.

We come now to consider the last process which is the sequestration: and this recites the certificate of the serjeant at arms, that the de-

* Is not found.

The next process to a commission of rebellion.

Why a serjeant at arms is sent.

What is the last process.
See the form in Harrif. Pract. Chanc. 300.

fendant

fendant had secreted himself, and then gives authority and power to the sequestrators to enter the manors, lands and tenements of the defendant, and of taking and possessing all his real and personal estate. Great was the struggle between the ordinary and extraordinary jurisdiction before this process came to be settled; for in the case of *Blagrove v. Watts* (a) they adjudged such commissions to be against the rules of the common law; for that the court of conscience had only remedy * *in personam*, and not † *in rem*, and that the court might compel the defendant by imprisonment to perform the decree, but could not touch his estate. And the chancellor in the cause of *Colston* against *Gardner* (b) cites a case where they ruled it, that if a man killed a sequestrator in the execution of such process it was no murder. But these were such bloody and desperate resolutions, and so much against common justice and honesty, which require that the decrees of this court which preserved men from deceit and fraud, should not be rendered illusory, that they could not long stand. And this process got the better of those resolutions on this ground:

(a) See before
p. 19.

(b) 2 Chan.
Cas. 43.

First, That the extraordinary jurisdiction might punish contempts by the loss of estates, as well as imprisonment of the person. Because that liberty being a greater benefit than property, if they had power to commit the person, they might as well take from him his estate, till he had answered his contempts.

* Against the person.

† Against the estate.

Secondly,

Secondly, to say that a court should have a power to decree about things, and yet should have no jurisdiction § *in rem*, is a perfect solecism in the constitution of the court itself.

When a person moves for a serjeant at arms, upon a commission of rebellion returned, and when this motion is made, the commission of rebellion is always produced, and is in the hands of the gentleman, who makes the motion, he delivers it into court, and it is left with the register, and upon * *non est inventus* returned by the serjeant at arms, the plaintiff's council moves thereupon for a sequestration against the defendant, directed to commissioners, therein to be named, to sequester the personal estate of the defendant, until he shall appear and answer the plaintiff's bill, clear his contempt, and the court make other order to the contrary.

The commission of sequestration being sealed, the sequestrators therein named (the plaintiff having the naming of them) proceed to seize, and sequester the real and personal estate of the party, against whom the commission of sequestration issues, and these commissioners are demeanable to the court, and are to act from time to time in the execution of their office, as the court shall direct; they are to account for what comes to their hands, as all other suitors do, they are to bring the money into court, as the court shall direct, to be put out at interest, or otherwise, as

§ Against the estate. * Is not found.

shall

shall be found necessary; but this money is not usually paid to the plaintiff, but is to remain in court, till the defendant hath appeared, or answered and cleared his contempt, and then whatever hath been seized by the sequestrators, shall be accounted for, and paid over to him. However the court hath the whole under their power, and may do therein, as they please, and shall be most agreeable to the justice and equity of the case.

The plaintiff's council may move, and obtain an order for the tenants to attorn, and pay their rents to the sequestrators, or for the sequestrators to sell and dispose of the goods of the party, and keep the money in their hands, or to bring it into court, as shall be most adviseable and fitting, at the discretion of the court.

Examinations
pro interesse suo
when necessary, and upon
what occasion
used.

Where the sequestrators seize the real estate of the party, any tenant or other person, who claims title to the estate so sequestred, either by mortgage, judgment, lease, or otherwise, or who hath a title paramount to the sequestrator, shall not be obliged to bring a bill to contest such title, but he shall be let in to contest such title, in a summary way, *viz.* he may move by his council, (as of course) to be examined * *pro interesse suo*, and in this case the plaintiff is to exhibit interrogatories, in order to examine him, and for a discovery of his title to the estate, and he must be examined on such interrogatories accordingly, and the master must state the matter to the court, and the parties may enter into proof, touching the

* Touching his interest.

title to the estate in question. And when the master has stated the whole matter to the court, it proceeds to give judgment therein upon the report, and if it appears that the party, who is examined * *pro interesse suo*, hath a plain title to the estate, and is not affected with the sequestration, then it is to be discharged as against him, with or without costs, as the court shall determine upon the circumstances of the case, and so † *vice versa*; and there may happen other circumstances and proceedings upon a sequestration, which cannot fall within the general rule here laid down, and which must be determined, according to the nature of the case, as it appears to the court.

Hitherto we have been speaking of the proceedings before, and after sequestration, for want of an appearance, or of an answer. And now we are to proceed, to see how the case will be, where an appearance is entered, and no answer put in.

The several processes of subpoena, attachment, and commission of rebellion, do issue without motion. Because the clerks of the office, when there is an affidavit made of the service of the subpoena, know whether there is an appearance or not, such appearances being formerly entered by the six clerks in their own books, and the defendant not appearing upon the return of each process, is the warrant for making out of the other; but the last prerogative processes, that is, the serjeant at arms, and the sequestration, are only granted

What process
issues without
motion.

* Touching his interest.

† Contrarywise.

What process
on motion
only.

The difference
between
a *capias* and an
attachment.

8 Co. 40.
Dalton's She-
riff 174, 178,
179.

upon motion. Because it must appear to the court, that the common ministers of justice were not able to take the party, before they shall recur to this extraordinary method.

But here we must note the difference between a *|| capias* and an attachment. Upon ‡ *cepi corpus* returned upon a *|| capias* at law, they amerce the sheriff if he does not bring in the body upon the statute *Westm. 2. cap. 39.* * *Et præcipit dominus Rex, quod vicecomes pro hujusmodi falsis responsionibus semel et iterum (si sit necesse) per justiciarios castigetur, et si tertio deliquerit, alius non apponat manus quam Dominus Rex.* And this is upon the words of the *capias* which are † *ita quod habeas corpus ejus coram nobis ad respondend. A. W. de placito transg. sup. casum.* So that the command of the writ is not obeyed unless he hath the body ready.

In an attachment the form of the writ is, § *ita quod habeas ejus corpus ad respondend. nobis tam de quodam contemptu per præfat. A. B. nobis illat. ut dicitur; quam super hiis quæ illi tunc ibid. objicientur, et ad faciend.*

|| A writ so called because the word *take* is an emphatical part of it. ‡ I have taken the body.

* And the Lord the King commands, That the sheriff be again and again (if there is occasion) punished by the justices for such sort of false returns; and in case he offends a third time, that no other person than the Lord the King lay hands on him.

† So that you have his body before us to answer *A. W.* of a plea of trespass on the case.

§ So that you have his body before us to answer us, as well of a certain contempt by the aforesaid *A. B.* against us committed, as is said; as what shall be then there alleged against him; and further, to do and receive whatever our said court shall think proper in this behalf, and that you do by no means omit it, and have there this writ.

atque

atque ad ulterius recipiend. quæcunque dicta Cur. nostra in hac parte consideraverit & hoc nullatenus omittas, et habeas ibi hoc breve. By which words it should seem they might amerce the sheriff for not bringing in the body, as they did upon the **capias* at common law. But because the writ was originally founded upon a contempt, it seems that when the sheriff has taken up the body he has paid obedience to the writ, tho' he does not actually bring him up to the court; because the contempt only induces a commitment, which is satisfied by imprisonment in the county gaol. And the stat. of *Westm.* 2. only relates to original and judicial writs, and not to these prerogative processes, and therefore they issued an || *habeas corpus*, which is an undoubted writ within the statute, upon which it is proper to ground an amercement.

If the court more than once give time to answer, they generally oblige the defendant to enter his appearance with the register, which is an appearance upon the record of the court, and is different from an appearance in the office by his clerk in court; for the appearance by a clerk in court, and going away without answering, is only a foundation to issue process, and there is no record of such appearance, for the defendant's clerk only gives notice for the plaintiff, which he enters in his book, that the defendant appears; but when he enters his appearance with the register, and does not answer, 'tis a departure in despite of the court, upon which, the court may order an immediate commitment, since this is not merely a contempt of the process issuing,

* See before. || See before p. 70.

G 2

but

but to the court itself, to which he appeared, and hath not answered.

Appearance upon an attachment with the register, if the defendant don't answer in four days, upon motion to be committed to the Fleet.

The entering an appearance with the register differs from appearing by the clerk in court, for when a man appears by his clerk in court, he appears as upon a subpœna, and therefore appears as not in contempt. But when a man enters his appearance with the register, he appears as upon an attachment, and then appearing upon contempt, if he don't put in his answer within the time, or within four days after, tis a motion of course, that he should stand committed to the *Fleet*, and then he must answer * *in vinculis*, for he is a prisoner to the court, and answers as a prisoner.

After a decree was pronounced, the old way was to spend the whole process of the court, by attachment, proclamation, and commission of rebellion, serjeant at arms and sequestration. But in the time of my Lord Chancellor *Elsemere*, a defendant was taken upon the process, and lay in contempt in the *Fleet*, having the money by him, which was decreed to the plaintiff, and the lord chancellor ordered a sequestration. About fourteen or fifteen years ago they began to shorten the process in execution of the decree, for if they must begin with the attachment, proclamation, commission of rebellion, and spend all the process, it would be a year's time before the decree could be executed, so as the plaintiff could have any effect of his suit, and therefore they proceeded to serve the defen-

* In custody.

dant with a copy of the decree, and upon an affidavit of service, and refusal to obey the decree, they moved that he might stand committed, and the practice then was, immediately to commit him to the *Fleet*, and upon a return of * *non est inventus*, by the warden of the *Fleet*, the court ordered a sequestration, but that was complained of by the serjeant at arms; and on the third day of *May* in the 7th year of the reign of King *George* the first, an order was made, that there should be no sequestration, but upon return of the * *non est inventus*, by the serjeant at arms. So that now the practice is, that they must either spend the whole process of the court, or upon affidavit of service of the decree, move for an order, that the defendant should stand committed for disobedience, and upon that order he may move for a serjeant at arms; and upon his return of * *non est inventus* he may move for a sequestration. This shortening of the process was justified by the ancient practice of the court, when they order the defendant, upon entering his appearance with the register, that if he disobeyed the order of the court, he should immediately stand committed. And if a man might be committed for non-performance of an interlocutory order, when he has recorded his appearance, and departs in despite of the court, he certainly may be ordered to stand committed after a decree pronounced, for the appearance of the defendant is recorded at the

The method
now used after
the decree
pronounced.

* Is not found.

hearing, or if the decree be pronounced in his absence, it is only conditional, and he is served with a copy of that decree, and acquiesces in it, before it can be absolute. And therefore, there the process may be well shortened, because his appearance or acquiescence is recorded in court, so that the whole process in execution of a decree, stands thus:

The decree is either in rem or in personam.

Binds all that come in in any privity.
Co.Lit. 344.b.

Either the decree is * *in rem*, or † *in personam*. If the decree be * *in rem*, yet it may be executed upon the person in the manner herein after mentioned, or else they may immediately execute it * *in rem*, by an injunction to put the party in possession of the thing decreed. And the decree binds all persons that come in in any privity, as heir or executor, or any alienee that comes in pending the suit, upon the rule, that § *pedente lite nihil innovatur*.

Vern. 166.

If the decree be † *in personam*, they may proceed to sequestration, by spending the process of the court, or by ordering the defendant to stand committed.

If the sequestration be for a personal duty, where the heir is not bound, and the defendant dies, there is an end of the sequestration, and it cannot be revived against the heir, because neither the heir nor the lands are bound by such decree.

But if the decree were upon a covenant, which bound the heir, and the defendant died,

* Against the estate. † Against the person.

§ Pending the suit there can be no alteration.

such

such decree might be revived by subpoena *scire facias* against the heir, to shew cause against the decree. If the decree be inrolled of record, or if not, by a bill of revivor, and when you have revived against the heir and executor, you may also revive the sequestration upon motion, if upon coming into court, they can shew no cause why the decree should not be revived.

But it was resolved in my Lord *Sommers's* 2 Vern. 89: time, that a decree should have the same authority to bind the personal assets, as a judgment at law, and therefore shall go * *pari passu* to be paid off and discharged. But the lien of the judgment upon lands came in by the statute of *Westm. 2. 13 Ed. 1. c. 18.* which only gives an † *elegit* for a moiety of the land in satisfaction of the debt, and therefore that could give no authority to lay a sequestration on the real estate for a meer personal duty, where the heir is not bound in the covenant.

C H A P. VI.

Of answers and exceptions, replications and rejoinders.

BY the antient civil law, when the libel was preferred to the judge, it was also delivered to the § *reus*, and if the defendant

De Judiciis
l. 5. tit. 1.
Law. 72 Code
lib. 3. tit. 9.
Verb. Aufer-

* Together. † A writ so called from the words in it *has elected* to have delivered to him, &c. § Defendant.

did not answer in ten days, they had the
 * *edictum primum*. And after ten days more,
 if the answer did not come in, they had the
 † *edictum secundum*. And in ten days more,
 Nov. 53. c. 3. they had the § *edictum peremptorium*. And if he
 did not come and answer in ten days more,
 judgment was pronounced upon him, as if he
 was absent. And these were called the several
 || *dilationes*, that were given the defendant to
 answer. But after the provincial judges were
 settled, then the Code brought in a new regu-
 lation, which was, that after the defendant was
 cited, the plaintiff was to give caution to end
 his suit in two months, and then he was
 likewise to deliver a copy of the libel to the
 ** *reus*, who subscribed the note of the time
 when such libel was delivered; and then there
 was a term of twenty days given the defen-
 dant, in which time he was to put in his an-
 swer, and if he did not, sentence was given
 as if the answer was put in. For they look
 upon the subscribing the time of receiving the
 libel, as a submission to contest within the
 twenty days. And the twenty days were
 reckoned as a time of deliberation, whether
 he would yield to his adversary, or contend in
 judgment. And therefore, if the libel was de-
 livered, and the subscription demanded, and
 the †† *actor* proved this, and the twenty days
 were out, then the defendant was presumed
 to acquiesce.

By our law, if a man was subpoenaed to
 answer, it was returnable at a time certain in

* First edict.

† Second edict.

§ Third edict.

|| Dilatories.

** Defendant.

†† Plaintiff.

term, and the term being reputed in law as one day, he had anciently time to answer during the whole term, unless he was hastened by request. And for that purpose, they might give him a rule to answer in eight days, from the time of appearance, there the time prefixed was eight days, as being double to the time of appearance; but this was found inconvenient, and to create disputes concerning the rule, and therefore they came to one uniform rule, which is now the course of the court, viz. that the defendant was to answer in eight days, if he lived within twenty miles of town; but if he lived at a greater distance from town, then he was intitled to a * *dedimus*, but for want of answering, or moving for a * *dedimus*, within eight days, an attachment issued of course.

An answer reputed insufficient, the defendant must answer in eight days.

The defendant to answer in eight days, if he lived in town, or within twenty miles of it. Where the defendant may have a *dedimus*.

Anciently the circuit round the court was ten miles, the same that was fixed for issuing the writ of subpoena returnable immediate. But for commons to answer, they took a greater distance, because defendants might conveniently enough come at that distance to answer in proper person.

They found a convenience in the court of chancery of having solicitors or clerks in court, and therefore, where the distance was more than twenty miles, upon motion and affidavit, that the defendant lived above twenty miles, they suffered the * *dedimus* to issue.

Note; It will be granted upon affidavit, if the party lives within twenty miles, if he be sick and incapable of travelling.

The * *dedimus* has a longer or shorter return, according to the distance of the party living

What return a *dedimus* ought to have.

* Commission.

I

from

from the town; but generally, if the subpœna be returnable the first return of *Easter* or *Michaelmas* term, the * *dedimus* must be returnable the last day of that term; but if the subpœna be returnable the latter end of those, or any other term, they have time till the next term for the return of the * *dedimus*.

The range of the court of exchequer.

In the exchequer, if the defendant lives within fifteen miles, he is to answer in person, which is the natural range of the court, by a subpœna returnable immediate, and if he lives within that range, he can't have a commission without a special order of court, upon affidavit of inability.

By the civil law, when the plaintiff had put in his positions before the judge, the defendant was to put in his contestations or negations of such positions, and the plaintiff had liberty to examine the defendant upon interrogatories, to supersede the necessity of proof; and these were called the † *libellus articulatus*, and was generally put in after the first act, where the defendant had answered the positions.

Clarke 35.

The answer begins in the form of the civil law, viz. § *Sub protestatione de nimia generalitate, ineptitudine, obscuritate, nullitate, et indebita specificatione dicti libelli*; and the oath is in the same manner, || *de scientia in his quæ*

* Commission. † Articles of the libel.

§ Protesting the said libel for being too general, absurd, obscure, vague, and unduly set forth.

|| According to your knowledge, as to what concerns your own act, and according to your belief, as to what concerns the act of a stranger.

pro-

proprium tuum factum decernunt, et de credibilitate in facto alieno.

We also flung the positions, and the * *libellus articulatus*, into one bill; and hence it is, that the interrogatories must arise out of the facts alledged in the bill, that if the interrogatories do not arise from the facts alledged in the bill, but are totally foreign to it, the defendant may refer them for impertinence, but if he does not, but submits to answer them as pertinent, the court will, generally speaking, oblige him to answer the bill, unless the interrogatories are totally foreign, and not at all pertinent to the bill.

The masters at first examined the defendant upon those interrogatories, but afterwards it was left to the counsel or commissioners in the country; and hence it was, that they sent to the commissioners a copy of the bill, which they called the tenor thereof, that they might examine the defendant upon the * *libellus articulatus*, as the masters were wont to examine the defendants above upon the articles of the bill itself; but afterwards the master left that to the counsel who drew the answer, as the court had left the perusal of the bill to counsel; for anciently the court perused the bill itself, to see whether the petition was proper before it was filed; but the court, by reason of the increase and multiplicity of business, leaving the perusal of the bill to the honour of the bar; the master likewise left the examination of the defendant upon the articles of the bill, to the counsel and com-

* Articles of the libel.

4 & 5 An. c.
16. sect. 23.

missioners in the country. The counsel's hand is not necessary there, as it is to a bill put in court, so that the sending the tenor of the bill to the commissioners in the country became perfectly nugatory, and was taken away by the act for the amendment of the law.

If the commissioners send up an insufficient answer, the defendant, on payment of fifty shillings costs, may pray an order for a new commission; and if the second answer be reported insufficient, upon payment of three pounds, he may move for a third commission; and if the third answer be insufficient, upon payment of four pounds, he may move for a fourth; but if the fourth answer be likewise insufficient, he shall pay five pounds, but can have no new commission, but must answer * *in vinculis*.

The party who intends to plead or demur, must first take care that he is not guilty of dilatories, for if he stands out to an attachment with proclamation, he cannot in that case plead in bar to the bill, and his plea shall be dismissed upon that suggestion.

Again, if the time for answering is out, and the party prays, by petition or motion, for further time to answer only, and not to plead and answer, and the court indulges him in it, he shall not in that case (though he may afterwards, upon advising with his counsel, find reason to plead) put in a plea, without special leave of the court, and upon notice;

* In custody.

for

for he might have prayed time to plead and answer.

But only desiring time to answer, may be a good reason to deny him pleading it, it being a further dilatory.

If the defendant takes out a commission to answer, he can't return a plea or demurrer; because the commission is to answer, or contest in the cause, which does not give the commissioners authority to receive any exception in relation to such contest; but the defendant may move the court for a commission to plead, answer, or demur, and the court will grant it, but with this restriction, not to demur alone; and then the commissioners may receive a plea, or an answer, and demurrer, because they have an authority from the court so to do; but if they send up a demurrer alone, the court will grant an attachment against the defendant, because such demurrer might be put in under counsel's hand without oath of it, if the commissioners send up a plea of outlawry in disability, if the plea be over-ruled, the defendant shall pay five marks costs, and if it be allowed, the defendant shall have no costs, for it might have been put in without such commission, and the plaintiff was put to the unnecessary charge of attending that commission.

This special commission, for so it is called (all other commissions being only to answer) is returnable as other commissions are, and there are * six days notice given to plaintiff's * Now 14. commissioners of the execution thereof.

And very often the defendant who pleads, is caught in the caption thereof, for if the
com-

commissioners return * *capta fuit hæc responsio*, without the words † *et placitum vel moratio*, the plea will be set aside, because it doth not appear that the party was ever sworn to his plea, which he must be as well as to his answer, but the court often indulges the party to amend the return.

Where the defendant pleads the pendance of a former suit in another court for the same matters, if it is in any of the courts in *Ireland*, this may be done at the coming in of his plea; the plaintiff may and ought to procure a reference to the master, and his report in fourteen days, that the former suit is not for the same matters, and in such case the plea is to be over-ruled, or the defendant may bring in his plea; and if it is well pleaded, and both suits appear to be for the same matter, the plea is always allowed.

Either party sets down the plea to be argued by petition, if allowed on the arguing thereof, the plaintiff pays five pounds to be recovered by subpœna; but if it be over-ruled, or ordered to stand for an answer, with liberty to except, then the defendant pays the plaintiff five pounds; but if the words are to save the benefit of the plea till the hearing, no other use could ever be found by these words, but that in truth it saves the defendant's paying costs for the over-ruling his plea, and therefore, though the court often makes use of these words, yet where the plea is very faulty or naught, tho' the court often saves the benefit

* This answer was taken. † And plea or demurrer.

thereof

thereof till the hearing, yet they declare it shall not avoid payment of costs.

If a plaintiff replies to a plea before it comes on to be argued, this is as full an admission of the plea, as if it had been argued and allowed, for the plea by this replication is allowed to be good, only the defendant is put to the proof thereof; and so he may be, when it is argued and allowed, but if he proves his plea the bill must be dismissed at the hearing.

Where a defendant appears, and puts in his answer in due time, if the plaintiff is not satisfied therewith, or conceives it to be insufficient, he hath, if the answer comes in in the vacation, till the first day of the following term; or if it comes in in term time, till the last day of that term to except thereto; and these exceptions are prepared and signed by the plaintiff's counsel, and are delivered over to the defendant's clerk in court. If the exceptions are not filed in due time, the defendant's clerk in court is not bound to receive them, he may put the plaintiff to obtain an order to receive exceptions, the time of the filing thereof being out.

The defendant hath eight days time allowed him to submit to answer these exceptions, which if he submits to, he is to pay to the plaintiff or his clerk in court, the sum of twenty shillings costs, for his answer being insufficient.

Note; the exceptions must be eight days on the file before the plaintiff can refer his exceptions.

Exceptions

Exceptions to answers are totally creatures of the court of chancery, for the exceptions in the civil law, were to the bill, and are in the nature of our pleas and demurrers, as is before mentioned. But there were no exceptions to answers, because upon the * *libellus articulatus*, the defendant was examined before the judge, and therefore the judge took down the answer of the defendant particularly; and if he did not answer, he was contumacious in the face of the court, and to be dealt with as such; but the court of chancery having allowed counsel to draw the answer, they very often drew it short and evasive, and therefore they had not the effect of the answer on the * *libellus articulatus* in the civil law; and hence it came to pass, that when the answer was short, they referr'd it to the master upon the exceptions, to see whether the answer was sufficient, and if it was not so, he reported it insufficient, which was a direction for a further answer. And then the counsel drew the second answer as they did in the first instance; hence if the answer came in vacation, the exceptions were to be put in the same vacation. If the answer came in in term time, the exceptions were to be put in in the same term, and in the exchequer, because they did not sit during the whole vacation, by reason of circuits. If the answer came in in vacation, the exceptions were to come in in four days of the subsequent term. This was established upon the method of the civil law, tho' with some variation, for when the

If an answer be put in in vacation time, the exceptions must be put in so too, and if in term time the exceptions must be put in in term time.

* Articles of the libel.

answer was given in to the * *positiones*, they then put in the † *libellus articulatus*, which was to be answered before the judge. And the court of exchequer, instead of referring it to a baron, which is the practice of *Ireland*, and was the antient practice of that court, they now hear the exceptions, and the plaintiff is to set them down to be heard the *Saturday* se'ennight after the same are come in. If they are not, the answer is presumed to be acquiesced in, and they are set down before the court, by way of shortening the time, to give dispatch to the suitor, who is presumed to be debtor and accountant to the King. But if the exceptions do not come in within time, yet the plaintiff may move, that the defendant may receive exceptions, for by the civil law, the plaintiff might move, that the defendant might answer the † *libellus articulatus*, at any time before he had replied to the defendant's answer. By the civil law, a man was examined three times upon the † *libellus articulatus*, and if he did not answer to the satisfaction of the judge, he was contumacious, and it was either taken § *pro confesso*, or he was obliged to answer in custody, and hence it was with us, if three insufficient answers were put in, the defendant was obliged to answer || *in vinculis*.

Instead of referring exceptions to a baron, they are to be set down by the plaintiff to be heard the Saturday se'ennight after they come in.

Not till he has made four insufficient answers.

Ch. Cas. 279.

But if the defendant, upon advising with his counsel, conceives his answer to be good and sufficient, then he puts the plaintiff to obtain an order (which is of course) to refer

* Positions. † Articles of the libel. § As confessed.

|| In custody.

the exceptions to a master. This order being drawn up, passed and entered with the register, the plaintiff attends the master, and takes out two warrants, and serves them on the defendant's clerk in court (there must be one day intervening between the date of the warrant, and the day of attending the master, unless the parties, for their own convenience, otherwise agree it among themselves). As for example, If the first warrant is taken out a *Monday*, it must be made returnable the *Wednesday* following; and the second warrant, which is dated on *Wednesday*, must be made returnable the *Friday* following, (so it is in all notices of motion, there must be a day intervening) to the end, the adverse party may have time to prepare his briefs, instruct his counsel, and get ready to defend the motion; which he could never do, if this rule was not strictly observed and pursued. And as in the case of a warrant or summonce, to attend the master, so in a notice of motion, they must be both left at the seat of the adverse party's clerk in court, and with him or his clerk or agent there, and oath must be made of the service thereof, at the seat of the clerk in court; and the party swears, "That *John* of *Oaks*, or *John* of *Styles*, acts as clerk in court for the plaintiff "or defendant in that cause, as the deponent "is informed and believes." And this affidavit must be filed before it can be read in court, and the service of the warrant, or notice of motion, ought to be at the seat (which is the known office for doing of business) and it ought to be served there whilst the office is open, which is generally between

Note; In all notices of motions there must be one day intervening.

Oath must be made of the service of a notice of motion.

Affidavit can't be read till filed.

eight and nine at night. And in that case the clerk in court hath time to send early notice to his client that night; whereas it sometimes happens that warrants, or notices of motion, are not left till ten or eleven at night, and even at the house of the clerk in court, which was never yet (if stood upon) esteemed good notice or service; for in that case his client can't have notice thereof till the next morning, and perhaps he may be gone out about other business, and does not hear of it till his return home at noon, or in the evening, and so his client is surprized, and he himself hath not due time to prepare for his defence, and therefore tis apprehended that this notice of being left at the seat ought to be strictly adhered to, according to the antient rule, to prevent any surprize.

This rule of serving notices of motion, and warrants or summonces from the masters, generally hold good in all cases, but as there is no general rule, but an exception lies to it, so there doth to this.

For where there is a motion for money to be paid out of court, it must always be personally served upon the party whom is moved against; the service upon his clerk in court was never held to be good service.

Motion for money to be paid out of court must be served personally.

And so where cause is shewn for the continuance of an injunction upon exceptions filed to the answer, and where the court puts the party upon procuring of the master's report in four days (as is ever done in such case) here the party is to take out and serve his warrant from the master, with all possible dispatch he can, and a day's notice to attend is sufficient;

So where cause is shewn for the continuance of an injunction upon exceptions filed to the answer.

If the first warrant is taken out in the morning, to attend that evening, and the second the same; this is well enough, because the party hath but four days to procure the report. And if he fails, he loses the fruit of his order. But in all these cases, where either the party or the master hath not time to finish his report in the four days, the solicitors usually agree, that the master shall date his report as within the four days, and give him a little longer time to consider of it. Or the master, whenever he is directed by this, or any other order, to make his report within such a time, may certify to the court, that the time is too short, and the court in that case gives so great credit to the report of the master (which must be read on the motion) that they will allow such further time, for the making of the report, as the master shall apprehend, and certify he wants to do it in.

The manner
of the master
making his
report.

There being two warrants regularly served, to attend the master upon the plaintiff's exceptions, taken to the insufficiency of the defendant's answer, both parties attend the master at the return of the second warrant, and the order of reference being produced, he hears them thereon, and the bill, answer, and exceptions being left with him, he usually takes time to consider thereof (unless the matter appears very plain on the one side or the other); and in that case he delivers his opinion in the presence of the parties attending him, and afterwards makes his report of the sufficiency, or the insufficiency of the answer (unless where the defendant doth not attend at the return of the second warrant to justify his answer); in which

which case, the master makes his report of the insufficiency of the answer, according to the exceptions then before him. But before this is done, he requires an oath of the due service of the warrants on the defendant's clerk in court, and then makes his report * *ex parte*, and thereby takes notice that he having been attended by the plaintiff's counsel, or clerk in court, or solicitor (as the parties attend him) and none attending for the defendant (tho' duly summoned, as by oath made before him appears) he reports so and so.

An oath required of the due service of the warrants on defendant's clerk, before the master will report the answer insufficient.

The party, in whose favour the report is made of the sufficiency or insufficiency of the answer (for of this alone we are now speaking) takes away the report, (he pays fifteen shillings before the hearing of a cause, and twenty-five shillings after the hearing) and carries the report, and files it at the report office.

The party in whose favour the report is made pays 15 s. for it before the hearing, and 25 s. after.

And if the report is, that the answer is insufficient, then the defendant is to pay (if a town cause) forty shillings for his answer being reported insufficient. And if a country cause, where the answer is returned up by commission, he pays fifty shillings. The same rule holds in an insufficient examination put in by the defendant.

Defendant pays for an insufficient answer, if a town cause 40 s. if a country cause, 50 s.

And for the recovery of these costs, and to compel the defendant to put in a further answer, the plaintiff sues out a subpoena for the costs, and serves the defendant personally therewith, and demands the costs of him, and if he refuses payment thereof, upon an

Subpoena's for costs must be served personally.

* On one side only.

affidavit of service of the subpœna, and demanding the costs (which is always made payable by the subpœna, to the plaintiff or bearer thereof, and the bearer, whoever he is, may give a receipt for the costs) there issues out an attachment against the party for non-payment of the costs, and such proceedings are had for recovery thereof, by carrying on the process of the court against the party contemning, as is usual in those cases, *viz.* by proclamation, and so on to a sequestration; but this rarely or ever happens in the case of forty or fifty shillings costs, which are generally paid upon the service of the subpœna.

The contemnor never to be heard till he hath cleared his contempt.

The costs of an attachment not executed.

And upon this head, it is to be observed as a general rule, that the contemnor, who is in contempt, is never to be heard by motion or otherwise, till he hath cleared his contempt, and paid the costs: As for example, If he comes to move for any thing, or desires any favour of the court, if the other side says, or insists he is in contempt, tho' 'tis but an attachment for want of an answer, which if not executed, is only ten shillings; and if executed, is twelve shillings and six-pence; yet even in this case, he is not intitled to be heard till he hath paid these costs (however small they are) he must first pay them to the party or his clerk in court, and produce a receipt for them in open court, before he can be heard; and this is always allowed as a good cause against hearing of the contemnor in any case whatsoever.

And

And to oblige the defendant to put in a further answer to the bill (where his answer is reported insufficient) the plaintiff is not bound to serve him with a new subpœna; but he is to serve his clerk in court with a subpœna * *ad faciendum meliorem responsionem*, which is always allowed to be a good service of the defendant; and he must answer over in eight days (if a town cause) or have a commission (if a country cause); and if the answer is not returned in due time, the plaintiff proceeds by way of attachment for want of a further answer (as usual) to a sequestration, as before stated.

The defendant is not to be served with a new subpœna to put in a better answer, enough to serve his clerk in court.

And if the defendant's answer is reported sufficient in the points excepted to, then the defendant takes out a subpœna for his costs, (just as the plaintiff does against him) he is intitled to the same costs as the plaintiff is against him, and proceeds by way of subpœna and attachment for recovery thereof, in the same manner as the plaintiff does against him, and as if the report had been in his favour.

Where the answer is reported sufficient, plaintiff is to pay the like costs defendant would in case answer was reported sufficient.

Exceptions to the master's report.

But still the report of the master, who is only a ministerial and subordinate officer, is not to conclude either party in this, or any other case whatsoever, for either party hath a right to appeal from the same to the judgment of the court; and in this case it must be by way of exception to the master's report, and such exception or exceptions must be signed by

Exceptions to the master's report must be signed by counsel.

* To put in a better answer.

H 4

counsel,

Five pounds must be deposited with the register by the exceptant.

counsel, and there must be five pounds deposited with the register by the exceptant, as a stake to recompence the other party, if the court, upon arguing the exception or exceptions, shall find the same frivolous ; and either party may apply for the bringing on the exceptions as they shall be advised ; and there is always an order for that purpose ; if the exceptions taken to the master's report are allowed, the party, who deposited the five pounds, takes it back from the register ; but if the exceptions are over-ruled, and the judgment of the master is found right, then the other party takes the five pounds deposit money.

If the master reports the answer insufficient in one single exception, the defendant must either submit to answer, or except to the master's report.

If the master reports the answer insufficient in one single exception, the defendant must either except to the report, or submit to answer, according to the report ; if he doth not except, but submits to answer over, he must take care to put in full answer ; for having once submitted to answer over, he hath allowed the judgment of the master to be good against him ; and in this case, he shall not insist by his second answer, that he ought not to answer the exception, nor shall he in the case of a single exception, afterwards except to the report, and bring it on for the judgment of the court, whether he ought to answer over or not, for this he might and ought to have done at first, and there he would have had the opinion of the court, whether his first answer had been good or not, which upon his second answer he can never have, because he hath concluded himself, by submitting to answer, according to the report.

But

But it is conceived this rule does not hold good in all cases, for where the master reports the answer insufficient in four or five more exceptions, it often falls out, that one or two of these exceptions are fatal on the party, and so they would appear, if the party excepted to the report; and therefore in this case, the party may submit to answer over, as to such of the exceptions, which he knows to be against him, but as to the others, if he is advised his first answer is full in those points, or if they are of such a nature, as ought not to be answered, or are altogether immaterial, the defendant may in this case, and notwithstanding he hath put in a further answer to the report, afterwards except thereto, and have the opinion of the court thereon, and it was never held, that he was in that case concluded by the report, or bound to answer, according to the report.

Where a master reports an answer insufficient in four, five, six, or seven, or more exceptions, and the party excepts to the report; if upon arguing thereof, the court are of opinion, that the defendant ought to answer the first, second, or third, they rarely go on any further, for if any one exception proves fatal and must be answered, the court seldom trouble themselves to go into the rest of the exceptions, but usually say, let the party answer according to the report at his peril; but there may be some cases, where the court will indulge the party to go into the rest of the exceptions; as if the defendant's counsel admit one exception to be against them, and yet strongly insist there is nothing in any of the

The defendant to answer only those exceptions that are against him.

If the court is of opinion that the defendant ought to answer the 1st, 2d, or 3d exception, they seldom go on any further, but make the defendant answer.

the other exceptions. In this case (tho' rarely) the court will enter into the merits of the rest of the exceptions; but if they do not, yet it is conceived, that the party is not bound to answer all the other exceptions, he may answer such as he knows to be against him; and yet, when his second answer is reported against him, he may except, and demand the judgment of the court, whether his second answer is not good and sufficient; and this was never thought to be, that the party was in all events bound to answer, according to the report, or to conclude thereby.

There are other cases where exceptions are taken to the answer, and where the party hath not answered them at all, but insists on his right, and that he is not bound or ought to answer them; and in this case the masters generally report according to the exceptions, because they will not take upon themselves to judge how far the defendant ought or ought not to answer, but leave it to be determined by the court; and when it comes on upon an exception, the court frequently dispenses with the defendant's not answering the exceptions, especially where they appear to be immaterial or in matters of title.

If the defendant stands out so long as to put in a third answer, which is reported insufficient, he stands committed.

If the defendant stands out so long, as to put in three trifling answers or examinations, it is a motion of course, to pray he may stand committed upon his third answer or examination being reported insufficient. And this rule is grounded upon good reason, because in this case, the party may be held in hand twelve months or more, before he arrives at a perfect answer or examination from the adverse

verse party, which the court will never endure.

In the exchequer, every plaintiff that shall take exceptions to the defendant's answer, shall put in his exceptions to the same four days within the term next after the coming in of the answer, and set down the same to be heard on the *Saturday* se'nnight following; in case the defendant will put in his answer before the time appointed for the hearing of the same exceptions, he is to put in the same two days or sooner, before the time for the hearing thereof, and then he is to pay but twenty shillings costs; and if upon hearing of the exceptions, the defendant be ruled to answer, the defendant shall forthwith pay to the plaintiff, or his clerk in court, three pounds costs, and shall put in his answer within eight days, unless he desires a commission to answer. In both which cases, he is to rejoin **gratis*, and join in a commission as aforesaid; and if the defendant's answer shall be adjudged good, the plaintiff shall forthwith pay unto the defendant, or his clerk in court, forty shillings costs; and all answers coming in after the setting down of causes, are to be taken as answers of the succeeding term.

Eight days after the succeeding term.

A plaintiff may after an appearance to his bill, and before an answer comes in, move and obtain an order (of course) to amend the same without costs (but in this case he must amend the defendant's copy); and in like manner, a plaintiff may, after coming in of the defendant's answer, move to amend his own bill, on payment of twenty shillings costs

Plaintiff may amend his bill before any answer comes in without costs.

* Without costs.

to

An original
and amended
bill all one.

How an a-
mended bill
must be drawn.

to the defendant (which is a motion of course); but then he must take care to pay those costs on the amendment of his bill, and before he proceeds against the defendant, or else he will be irregular, and he must in this case serve the defendant * *de novo*, and proceed against him (as in the case of an answer to an original bill) since the original and amended bill are, in the eye of equity, only one bill, and they both make up but one record.

This amended bill must very shortly recite the original bill, it ought to take no further notice of the original bill, than what is absolutely necessary to introduce the amendment to avoid impertinency, as but too often happens on these occasions.

Replication in the civil law.

Replication in
the civil law
what.

New matter
discovered af-
ter replication,
by leave of the
court the party
may have a
supplemental
bill.

According to the civil law, the plaintiff, by leave of the court, might add any new position before replication; for the replication was the contestation of the answer; and therefore after the answer was contested, there could be no positions, but they went on to their proofs. But if any new matter was discovered after replication, they might, by leave of the court, file a supplemental bill, touching any matter of fact that was discovered after such replication; for the supplemental bill was in the nature of a new cause, which might be brought, by leave of the court, after the † *contestatio litis* in the former cause, and the

* Again.

† Contestation of the suit.

court might lengthen the time for publication, after such supplemental bill and answer came in, because the prolongation of the probatory term, was very much in the breast of the court; but if the supplemental bill be moved for after publication, the court never gives them leave to examine any thing that was in issue in the former cause, by reason of the manifest danger of subornation of perjury, where they have a sight of the examination of the witnesses; but for matter of account, there may be a supplemental bill after publication, because they examine to such matters of account before the master or deputy after publication; and this is from the necessity of the thing, because the charge or discharge must be made up privately before the master or deputy, and therefore they being in charge and discharge, the particulars of which must be proved, such accounts being now kept by books or notes, and formerly by scores or tallies one against another; and therefore a supplemental bill in matters of account is seldom refused; so likewise a supplemental bill may be for any fact discovered after publication passed, that was not in issue in the same cause, and where such fact might vary the decree; but after the decree is pronounced and inrolled, it must be by bill of review and reversal; of which more hereafter.

Formerly they had a manner in chancery of filing a special replication, which is setting out of further facts in support of the bill; and this created special rejoinders, surrejoinders, rebutters and surrebutters; but this was found to create great perplexities and disputes how far the

The court may lengthen time for publication after a supplemental bill.

After publication, the court never gives leave to examine any thing that was in issue in the former cause unless account.

the subsequent pleadings were in support of the bill and answer, and therefore they came back to the old and solid method of the civil law, by adding new positions after issue was joined, and by supplemental bills, and by making a new cause afterwards.

Where a bill is filed and an answer put in, if the defendant does not proceed in three terms the bill will be dismissed.

Where a bill is filed, and a full answer put in thereto, if the plaintiff doth not proceed in his cause in three terms, the defendant may in that case move (as of course) to dismiss the bill for want of prosecution, with costs to be taxed by a master, but he must produce the six clerk's certificate of the time of filing the answer (and the six clerk certifies that since that time there have been no proceedings in the cause, as appears by his books) this certificate however is never called for; the counsel who makes the motion is supposed to have, and in truth always hath it in his hand, for he cannot move without it: The master taxes these costs, and they are recoverable by subpoena as in other cases where costs are to be paid by either party. The ancient rule was, that a man might dismiss his own bill on payment of twenty shillings costs; but this in process of time, was found so great a grievance, that the legislature took notice of it, and made an act of parliament (a) that no bill should be dismissed but on payment of full costs to be taxed. The party 'tis true may move, and often does to dismiss his own bill with costs to be taxed; and as this is a motion of course, so it tantamounts to the defendant's moving to dismiss the same, it only prevents the defendant's moving for that which the plaintiff had done for him.

(a) 4 & 5 An.
c. 16. sect. 24.

But

But tho' this proceeding of dismissing bills, for want of prosecution, with costs, is laid down as an established rule of the court, yet cases may be found out where it will not hold good.

As for example, Where a bill is filed against several defendants, it often falls out that one defendant answers in due time, when another defendant is forced to be prosecuted for want of an answer, and the plaintiff can't proceed in his cause, till all the defendants answers are in; and therefore whenever this case happens, and where it appears to the court, that the plaintiff is going on with his suit, and prosecuting for want of answers, it has always been allowed a good cause to discharge the order of one single defendant, under pretence of dismissing the bill as against him for want of prosecution; and this is grounded upon the highest reason, because the plaintiff cannot proceed with effect in his suit till all the answers are in; and because it often falls out, that one defendant's answer comes in in due time, when the answers of the other defendants can't be got in under six or twelve months after filing the bill, or at least not sufficient ones; to say, that because one defendant hath fully answered, and is not proceeded against, that therefore the bill **quoad* him ought to stand dismissed, when at the same time the plaintiff wants an answer from the other defendants, and without it cannot proceed to have a compleat decree, is, what was never yet allowed of; for where a plaintiff is

* As to.

prosecuting for want of answers, one single defendant shall never dismiss the bill, during that prosecution.

And though a bill is dismissed for want of prosecution, yet the plaintiff may move to retain his bill on payment of costs out of purse. But in this case he ought to proceed with effect in his cause, which if he fails in, it will come a second time to be dismissed, for want of prosecution with costs, to be taxed by the master.

Note; to the rule in the exchequer as to the plaintiff's replying.

In the exchequer, if the plaintiff doth not reply to the defendant's answer, sometime the next term after the answer is put in, the defendant may, the term following, give a rule to be dismissed within a week; and if the plaintiff shall not within that time reply to the defendant's answer, the defendant shall be dismissed with five marks costs. But if the defendant does give a rule to be dismissed for want of a replication, upon the coming in of such replication, the defendant is to rejoin *gratis*, and join in commission; and if the plaintiff doth not the same term, or the term following, take forth a commission to examine witnesses, the defendant may either take forth a commission * *ex parte*, or else be dismissed with five pounds costs; and in all cases, where the defendant shall give a rule, either for not replying to the defendant's answer, or for not proceeding after replication, if there be not a week in term, the plaintiff is to have a day to shew cause, till the setting down of causes.

* On one side only.

REPLI-

R E P L I C A T I O N.

The replication is the contestation of the answer, and this must be filed in order to put the answer in issue.

The replication the contestation of the answer.

By the antient civil law, the plaintiff was to give security, as is herein before mentioned, to prosecute his suit in two months, and if he did not, he was to be dismissed, and answer damages to the party. This begot the rule, that the plaintiff must reply in three terms, and if he did not, the defendant might move for a dismissal with costs. The rule in the exchequer is more according to the form of the common law; for after plea pleaded, the plaintiff was to reply the then next term, and if he did not, the defendant gave him a rule to reply in a week of the subsequent term, and if he did not, there was an order for dismissal, as in such cases there was judgment at law, for want of a replication; but if there were several defendants, one could not get an order for dismissal, till a full answer came in from them all; because the plaintiff can't go to proof against one only, since publication must pass against them all, before the decree can be obtained, but then the plaintiff must, without delay, pursue the process of the court against the other defendants; whenever the replication is filed, in order to close the * *litis contestatio*, there must be a subpoena to rejoin, which is according to the old civil law, which

Plaintiff must reply in three terms.

Rule in the exchequer.

Rejoinder.

* Contesting of the suit.

I

required

required a citation, in order to form the act of the court, and therefore the first citation was to answer, the second to rejoin, upon which the probatory term was formed; and the third was the subpœna or citation to hear judgment; but if the defendant delayed the plaintiff upon the first citation, the court very justly might impose terms upon him, such as to rejoin *gratis*, and that he should consent to form the probatory term, without the service of a subpœna to rejoin; if the plaintiff replies, the defendant can never dismiss the bill, without hearing the cause, because the defendant may rejoin *gratis*, and prove his answer, and so bring the cause to a hearing. But this rule is now altered; for if a plaintiff replies, and never serves the defendant with a subpœna to rejoin, nor takes any step towards the making of proof, but sleeps for three terms, the defendant may dismiss the plaintiff by rejoining or setting down the cause, because they look upon the replication, tho' it be a contestation of the answer, to be only matter of form, and therefore if the plaintiff afterwards sleeps for three terms, he acquiesces in a dismissal, and the meer filing of the replication, tho' it does put the defendant in a capacity of making proof of his answer, yet, if the plaintiff will acquiesce, and not take any steps towards the proving of his bill, it would be very hard, that the defendant should be put to the trouble and charge of setting it down at his own request; but if witnesses have been examined, and publication passed, there, tho' the plaintiff should sleep three terms, it must be set down

* *ad*

* *ad requisitionem defendentis*, because the court can't make a decree upon acquiescence, when the plaintiff might have proved the allegations of the bill.

If at any time the cause sleeps for a year, the plaintiff must serve the defendant with a subpoena † *ad faciend' attornatum*, unless the defendant's clerk in court will voluntarily appear, tho' it is thought fair practice, if the defendant be living, to go on without such service; and the reason of the subpoena † *ad faciendum attornatum*, was, because the defendant might be dead in so long a time; and therefore they thought the first appearance by the clerk in court not sufficient to found any other acts of the court on, unless a clerk in court would appear for him, and then it was presumed that the defendant was living.

Where a subpoena ad faciendum attornatum is requisite.

C H A P. VII.

Of the examination of witnesses and passing publication.

THAT which closes the § *litis contestatio* is the subpoena to rejoin, and the civilians and canonists held, that it was absolutely necessary, that there should be a citation to the defendant, previous to the examination of witnesses, otherwise the || *receptio testium* is an

* At the defendant's request. † To make an attorney.

§ The contesting of the suit. || Admitting evidence.

absolute nullity; and the reason they give is, that the defendant, if cited, might either examine or object to their credibility, or put such cross interrogatories to them, as might bring out circumstances in his favour which he would not have an opportunity of doing, if he was not cited; but it is not necessary for the defendant to appear, because the citation is in his favour, and he may renounce a privilege introduced in his favour.

Lanul. Justif.
of canon law
92.

Gail 157.

de Dilat.

Maranth. de

Dilat. 305.

They had anciently at the civil law, as appears by the ninth Novel, cap. 4. col. 7. tit. 2.

* *de testibus quia vero*, three probatory terms or dilations, according to the rule of the civil law.

Peers 210.

Nevius in
Novel 189.
Gothefred in
Cod. lib. 4.
tit. 19. de
probat. l. 19.
et qui semel.

† *In testem testes, et in hos, sed non datur ultra*, in the first probatory term, the plaintiff and defendant were to produce their first set of witnesses; in the second they were to bring witnesses to their credit, or to invalidate their testimony; and in the last probatory term, they were to restore the credit of their first witnesses; and it was with great difficulty they granted a fourth probatory term, and that was upon the solemn oath of the party moving for it, and declaring upon such oath, that he, or his advocate had seen none of the depositions, nor knew what was contained in them, and over and above the § *juramentum calumniæ*, swearing again, that it was not done out of vexation nor to protract the cause, for it was highly presumptive without an oath, that the desiring

* Of witnesses who from the truth. † Witnesses in support of testimony, and others in support of them, but no further. § Oath of not proceeding out of malice.

the

the fourth probatory term, was to that purpose; but after the fourth dilation, there was to be no fifth probatory term, even * *jussione divinâ*.

The judge was to examine upon the articles, but it was in the breast of the † *actor*, to exhibit interrogatories, founded on the articles, but not of necessity, but if any interrogatories were exhibited, not founded on the articles, the depositions taken upon them were to no purpose.

One of the judges of the court himself anciently examined, and therefore he might form the interrogatories out of the articles as he pleased; but the adverse party was to exhibit interrogatories for the judge to examine upon, because the matter upon which the defendant might cross examine to invalidate, might not be within the articles, but no copies of the interrogatories were to be given to the adverse party. Gail. 194. 5.

Upon the articles and interrogatories thus exhibited the judge examined, and he was to consider whether the witnesses answered readily, or whether they brought a story formed to him. Corvin. de Testibus, lib. 22, tit. 5. in Digest.

The depositions thus taken before the judge, were to be kept secret till publication, and the judge was to use his endeavours with the parties, that they should renounce any further production of witnesses before publication, because the parties should not bring false witnesses to disprove what had been sworn to.

* By the Emperor's command.

† Plaintiff.

Maxim.
2 Inst. 597.

If the place was remote where the witnesses lived, the court would appoint commissioners to examine such witnesses, commonly sending a notary of their own, who was often in commission with them, and with these commissioners they sent a copy of the articles, but the parties might exhibit interrogatories for the commissioners to examine upon, as they did to the judge, and these commissioners were to examine themselves; and could not delegate their power, for * *delegata potestas non potest delegari*; these commissioners could not send process to the witnesses, because they were delegated only to examine, but the process must be taken out from the court itself, to the witnesses, to make them appear.

These commissioners were likewise to be indifferent, for upon exception to the partiality of one of them, the court would supply his place by putting in another.

These witnesses were to have their charges, and the rule was that rich persons were to have their expences only, because they were not to be paid for doing their duty, but the poor were not only to have their expences, but the price of their labour over and above, that they might not be damaged for doing their duty.

Examination
of witnesses to
perpetuate
their testimony.

The civilians had a manner of examining witnesses † *in perpetuam rei memoriam*, which was two fold, either the common examination, or § *in meliori forma*; the common examination was, when the witnesses were very old and in-

* A delegated power cannot be assigned.
† To perpetuate testimony. § In better form.

† To per-

firm, or sick, and in danger of death, or were going into other countries; in this case it was usual to file a libel, and without staying for the * *litis contestatio*, the plaintiff examined his witnesses, immediately giving notice, if it were possible, to the other side, of the time and place of the examination, that he might come and cross examine such witnesses, if he thought fit, and these depositions stood good, in case the witness died or went abroad; but the plaintiff was obliged to † *edere actionem* within a year, otherwise these examinations went for nothing; but if the witnesses lived, or did not go abroad into other countries, then they were to be examined § *post litem contestatam*. Gail 162, 3, 4. Venat. Anal. 251, 2, 3, 5, 6, &c.

The examination || *in perpetuam rei memoriam*, Venat. ibid.
in meliori formâ, is ** *ad transuenda instrumenta*; and in this case, there must be a * *litis contestatio*, before the examination, because there is no need of so much celerity in proving the instruments, as there is, where the witnesses are likely to die, or are going into remote parts; in these cases, they are not bound to proceed in any action, upon these instruments within a year; but in both cases it seems, that the †† *publicatio testium* was, when the judgment was begun before the ordinary judge, or which is all one, when there was a * *litis contestatio*.

To the libel or petition before the judge, for examining the witnesses §§ *de bene esse*, the

* Contesting of the suit. † To produce his libel.

§ After contesting the suit. || To perpetuate testimony in better form. ** To establish instruments.

†† Publication of the depositions. §§ Conditionally.

interrogatories must be annexed, the names and ages of the witnesses to be examined must likewise be inserted, and it must be suggested in them that they are sick and infirm, or going abroad into remote parts, as the case happens to be; and whether the party against whom such supplication is formed, is to be plaintiff or defendant.

Venat. Anal.
251, 2, 3, 5,
6, &c.

If the person against whom the supplication is formed, is to be * *actor*, you need not put in the age of the witnesses, and that they are invalids in your bill, because such * *actor* not being confined to proceed within a year, but being left at liberty to proceed when he shall think fit, the † *supplicator* may examine any witness, since there may be danger that he may lose his witness, when the adverse party may proceed at any time.

Venat. 256.

Maranth. 250.
de public.

Gail 184, and
so on, de pub-
lic.

The next thing was the passing of publication, and formerly the adverse party was cited for that purpose; but afterwards the use prevailed to give a rule to the adverse party, to shew cause in four days, why publication should not pass, and if within that time he did not shew cause for prolonging the probatory term, then publication passed; and afterwards there could be no examination of witnesses, unless by the special direction of the judge, upon good cause shewn, and an affidavit of the party, that he, or those employed by him, had not, nor would see the depositions of the witnesses, which were published; by reason of the manifest danger of perjury, and subornation of witnesses, in case exa-

* Plaintiff.

† Petitioner.

minations

minations should be allowed, after publication.

But after publication, there might be * *editio instrumentorum*, till the conclusion of the cause, because there was no danger of perjury, upon the proof of such notorious instruments. Gail as before.

The judge was not concluded by the publication, to examine either of the parties upon personal interrogatories, or to re-examine the witnesses themselves. Gail 186.

The last act † *quoad* the proof, was the § *conclusio causæ*, which was concluding in fact, and that was an instance of either party to the judge, that either party should renounce all further proof, and if the party did renounce the proof, there was a conclusion; but if he did not shew any cause, why he should not, for his contumacy in not renouncing, the conclusion was taken || *pro confesso*, but this is not the essence of the proof. Maranth. 357.
de conclus.
causæ.
Gail 189.
de conclus.
causæ.

After the conclusion in the cause, they moved or petitioned the judge to set down the cause to be heard, which they called ** *ad allegandum in jure*, and then there was a citation to the defendant to appear at that day, and upon proof of the service of that citation, and reading his answer and proofs of the cause, if he did not appear, the advocate for the plaintiff first argued, and then the advocate for the defendant, and thereupon sentence was given.

* An edition of the instruments. † As to.

§ Conclusion of the cause. || As confessed.

** Arguing in court.

The PROCEEDINGS in EQUITY.

Tothel 20.

With us there must be a subpœna to rejoin, which is the same with the citation on the examination of witnesses, and on the return of that subpœna, the ancient way was to give the defendant a rule to rejoin the same day se'nnight, and afterwards two returns were allowed for the defendant to produce his witnesses, and then a peremptory day, before which day the defendant might come in, and have a commission to examine witnesses of course without motion; but the antient books say, he shall lose the benefit of rejoinder; that is to say, he shall rejoin no new matter, as anciently they might; and the reason was, because, when the rules for rejoinder were out, he could not rejoin, but the replication was to be taken as uncontroverted,

The time appointed by these rules for rejoinder, concluded the * *lis contestata*; the two ordinary days of return, and the peremptory day, were the first, second, and third probatory term; and then if the defendant did not come in, and proceed to examine his witnesses, in conjunction with the plaintiff, the plaintiff had a commission † *ex parte*; because the defendant's probatory terms being out, the plaintiff might proceed alone, tho' during such procedure, the defendant cannot join in the commission, because he has taken no steps to that purpose, yet he may examine his witnesses in the office, because before publication

* Contesting the suit. † On one side only.

the rules run equal for each side to examine before the judge; but the commission, after the peremptory day, being in the nature of the fourth probatory term, at the end of that commission, they may pass publication; for the defendant could not, in delay of such publication, pray a commission, or further time for the examination of witnesses before the judge; for that had been to desire a fifth probatory term, which the civil and canon law never allowed.

But afterwards they came to this rule, that the defendant being served with a subpoena to rejoin, the plaintiff was of course, upon producing an affidavit thereof, to have an order for the defendant to rejoin, and join in commission in four days, giving the defendant's attorney notice thereof; and the plaintiff might thereupon, in eight days afterwards, leaving his commissioners names at the office, have at his own costs a commission * *ex parte*, directed to two of the plaintiff's commissioners, and two such as the officer should think fit to nominate; if the defendant's attorney having notice, if in town, did not in that time name commissioners for the defendant, and pay half the costs of the commission, and if afterwards the defendant desired to examine any witnesses on his side, he would be barred from having any commission, without special order of the court, where good account must be given of such laches.

How plaintiff must proceed in order to oblige defendant to rejoin in commission in four days after service, and eight days afterwards plaintiff may take out a commission *ex parte* at his own costs.

By this rule it should seem, that the four days were given for the rejoinder, and the

* On one side only.

The practice
now used.

eight days for the three probatory terms, in which the defendant was to examine; but the canonists themselves having relaxed the notion of the three probatory terms, and put them all into one; and there being no absolute necessity that the client himself should have immediate notice, but his clerk; they have therefore contracted the whole act of proof into one motion, which is this, that the service of the subpoena to rejoin on the clerk in court, be good service, that the defendant should rejoin * *gratis*, and strike commissioners names in eight days, and that the defendant should examine his witnesses this vacation, and publication pass the first day of next term.

Pract. Reg. in
Chan. 347.
If subpoena to
rejoin before
replication fi-
led, defendant
shall have
costs.

If the plaintiff serves the defendant with a subpoena to rejoin, before he has a replication, the defendant appearing upon such subpoena, shall have his costs taxed, because the plaintiff had not closed his contest of the answer, before he served the subpoena to rejoin, to put the defendant upon the proof of it.

Of the Commission to examine Witnesses.

The commission sent to the commissioners, is to examine † *de quibusdam interrogatoriis, tam ex parte querentis, quam ex parte defendantis*; and here it is to be known, that the examination in court was originally in chancery, before the master of the rolls, who was one of

* Without costs. † Upon certain interrogatories, as well on behalf of the plaintiff, as on behalf of the defendant.

the judges of the court, and therefore it should seem that the examination might be upon the bill, without interrogatories drawn and framed, as the examination with the canonists may be drawn upon the * *libellus articulatus*, but afterwards the master of the rolls having left the examination of the witnesses to his clerks, as the barons of the exchequer did to theirs; from thence-forward the judge did not, but the counsel for the party, whose witnesses were to be examined, framed the interrogatories, upon which the clerks examined, and so from thence-forward it became the practice to send the commission to the commissioners, to examine upon interrogatories, as the examiners did above.

If either party examine in town, the examining party must give a note to the adverse party's attorney, or clerk in court, of the names and place of abode of his witnesses, and by the rules in *England*, he was to shew him to the adverse party's clerk in court, and such person so producing his witnesses, may examine them within four days, but the court will oblige such person to produce his witnesses, some time before publication, to be cross examined by the other side, in case such witnesses do not appear upon the subpoena † *ad testificandum*; otherwise the depositions shall be suppressed; but on examination in the country, the person who has the carriage of the commission, must give fourteen days notice either to the party himself, his attorney,

How an examination might formerly have been had.

Ord. Cur. 204. What notice, and to whom to be given, if the party examines in town.

* Articles of the libel. † To testify.

See exchequer or to the other two commissioners. This rules, that the fourteen days notice was the ancient notice of day of service a trial in a cause at law, and from thence is exclusive. taken.

Each party delivers his interrogatories at the opening of the commission.

The interrogatories were anciently annexed to the commission, and so they are now supposed to be; but by consent of parties, they are delivered to the commissioners, at the opening of the commission, and this is the present practice; for the expediting such commissions, the way is, that each party give four commissioners names, and each side strike out two; but if there be any objection to all the four, the party making such objection, may move the court, that the other side may name other four, or that the master may strike other commissioners names * *ex parte*, because tho' the commissioners are named by the party, yet that is but by way of proposal to the court, for they are the ministers of the court, and therefore must be impartial.

The commissioners can only examine upon the set of interrogatories, that is first put in before them, and no new ones can be examined upon before them, without leave of the court, because their commission is to examine upon such interrogatories, as are supposed to be annexed to the commission, or such as are delivered in at the opening of the commission, which now come in the room of those formerly annexed; and it is presumed that there has been a discovery made of the proofs, when the party is desirous to examine, upon a new set of interrogatories.

* On one side only.

But

But before the examiner, they may examine upon a new set of interrogatories, because that is presumed to be the examination of the judge, and the judge may examine upon interrogatories * *ex re natâ*, out of the articles; besides, the examiner is at the peril of his office, to make no discovery of the proofs.

The plaintiff has regularly the carriage of the commission, and so is to appoint time and place; but if the defendant supposes, that the plaintiff will aggrieve him, by such appointment, he may move for a duplicate of the commission, and that the officer may appoint time and place.

When plaintiff not intitled to the carriage of the commission.

If the plaintiff or his commissioners abuse the carriage of the commission, by making unnecessary adjournments, or an irregular examination of the witnesses; that may intitle the defendant to a commission of his own, and that he may have the carriage of it himself, because he shall not be obliged to produce and examine his witnesses, where it can't be done impartially.

The fair examination by commissioners is not to adjourn without necessity, because that would be to harass the defendant by obliging him to travel from place to place to cross examine; but if it be necessary, they may adjourn not only in time, but place. And this affair must be performed as far as it is possible † *uno actu*, that there be as little opportunity as possible, to divulge the depositions, that neither side may better their proof.

Commissioners not to adjourn.

Must be done in uno actu, if possible.

* On the matter which arises.

† All at once.

When

When a witness is produced, he must first be examined upon the interrogatories of the producer, and then forthwith, without suffering him to go abroad, upon the cross interrogatories of the other side, and the depositions are to be read over to him, every sheet whereof he is to sign, that so they may have the sense of the witness * *ex re natâ* without being tampered with.

The depositions being thus taken, are to be bound up, and signed and sealed by the commissioners, and sent by a messenger of their own to the court, out of which the commission issued, who is to swear, that they were not opened or altered since they were delivered to him.

Within what distance of the town commissions issue.

Witnesses are not to be examined by commissioners, within ten miles of the town, because that is the circuit of the court, and so the district of the examiners.

Party injured must complain to the court by affidavit.

If any of the commissioners obstruct the others in their examination, or examine irregularly, they may certify such misbehaviour to the court without affidavit, because being officers of the court, they are allowed to certify, but there must be a complaint from the party injured by affidavit, otherwise the court will not take notice of their certificate alone, because they are appointed for another purpose, and are not to certify to the court but of necessity.

Who to pay the witnesses.

The witnesses are to be paid by the producer, according to the rule before mentioned, in the civil and canon law.

* On the matter that arises.

There

There must be a subpoena * *ad testificand'* taken out, directed to the witnesses, and a summons from two of the commissioners, of the time and place, where they are to be examined; and if the witness so summoned and served, does not appear, the court will grant an attachment against him, unless he comes up at his own expence, to be examined before the examiner.

Or if he be summoned by the commissioners Praet. Reg. in Chan. 89, 90. without a subpoena * *ad test.* and don't appear, the court will order such witness to attend at his own expence, and to be examined; and if he disobey such order, then an attachment will go against him.

If there be due notice of executing the commission, and at the day appointed the commissioners meet, and the commission is opened, but no witnesses examined, nor any adjournment made, the commission is lost; but if it be not opened, they may give fresh notice and proceed, unless in the meantime the court be moved, and an order made to pay the costs of the former day, before they proceed; and the reason of this rule seems to be, that the not adjourning, is a refusal of the commissioners to act any further upon it; for tho' the court itself never adjourns, because it is always open, yet the delegated power must adjourn, because they have no standing and constant power as the seal has, but their power arises from the words of the commission, which are,

* To testify.

K

* *quod*

Prax. Alm.
Cur. 83.

* *quod mandamus, quod ad certos dies & locos, quos ad hoc provideritis, testes prædictos coram vobis venire faciatis, et advocatis,* so that if they do not provide time and place by an adjournment, they have no authority to act further by that commission, for the delegated authority must pursue the words of the commission, or else it will be construed as a refusal to act, but if they don't open the commission, their not acting at that time, will not be construed as a refusal to act, but it is harassing the defendant, for which he may complain to the court, and have redress, and their not acting before the commission is opened, is not construed to be a refusal, because they don't know what their authority is, till the commission is opened.

Pract. Reg. in
Chan. 87.

Where one of the plaintiff's commissioners meets, and one of the defendant's, and the commissioner for the plaintiff refuses to act, the commission is lost, but the plaintiff shall pay the defendant his costs, and the defendant shall have a new commission, and the carriage of it; and so it is when any commission is lost, through the default of him who has the carriage of it, for he is unworthy to have the carriage of the commission, who appears to make default in the execution of it.

If due notice be given, and one side proceeds and examines his witnesses, the other, if he does not examine, shall not have a new commission, unless affidavit be made of some

* We command you, that you cause to come before you, by summoce, at certain days, and to certain places, which you shall appoint for this purpose, the aforesaid witnesses.

reason-

reasonable cause of his non-attendance, and that neither the party who did not examine, nor any for him, or by his direction, or knowledge, has seen, heard, or been informed of the depositions taken, or any part of them, nor willingly will see, &c. till he has examined, or till publication; this is, that the defendant may not have an opportunity of knowing what has been proved for the plaintiff, and so be able to contest it. Pract. Reg. in Chan. 87, 88.

And where such new commission is granted, it shall be all at the charges of the defendant, and the plaintiff is permitted to cross examine without charge.

But if the plaintiff will upon such new commission produce any witnesses, he must be at equal charges of the commission, because he has equal benefit by the examination of his own witnesses.

But he at whose instance a commission is renewed, must examine all his witnesses upon such commission, or in court before the return of it, because he can't be indulged in a further probatory term. Ibid. 89.

If the commissioners on both sides attend the execution of the commission, and the one side examines, and the other neither examines nor puts in any interrogatories, he shall never afterwards examine, unless upon special order of the court, upon good cause shewn, because he must not form his interrogatories upon the discovery made to his commissioners, of what the other side examined to. Ibid. 88.

A commissioner may be examined by the other commissioners, if he be examined first, before any other depositions taken in the cause; Ibid. 91.

but if any other deposition be taken in the cause, his depositions shall be suppressed, for if it were otherwise, a commissioner might lie in wait, and after having knowledge of the depositions, might by his oath contest the same.

Praet. Reg. in
Chan. 91. If the master appoint time and place, yet the commissioners may agree to adjourn, because the appointment of the master is only for the opening of the commission; and therefore, if the commissioners agree, they have yet power to make proper adjournments.

Ibid. 93, 94. Where the commissioners meet and examine, and afterwards adjourn, and one of the defendant's commissioners takes away the commission, and the other commissioners meet at the day adjourned, and examine witnesses, and return the depositions, the court will order such depositions to lie, and the subpoena * *duces tecum* to issue against the commissioner who took away the commission, that he may bring the authority, by virtue of which the depositions were taken, for if they had a proper authority, the not having the commission before them, does not impeach the depositions.

When the parties have examined, they give a rule, as they do in the canon and civil law, for publication, and if no cause be shewn to the contrary within four days, the rule is made absolute.

The present practice is, When a full answer is put into a bill, if the plaintiff is in good earnest to proceed in the cause, he forthwith files a replication in the office to the de-

* Bring with you.

defendant's answer, and he may, if in term time, sue out a subpoena against the defendant to rejoin, returnable at a day certain, and he may, if he pleases, serve the defendant therewith (unless where the defendant lives in town, and may be with ease served); for then it is most usual to apply by petition or motion, that a subpoena to rejoin returnable immediately may be awarded against the defendant, and that service thereof on the defendant's clerk in court, may be deemed good service of the defendant; this is of course and is never denied. But to this is often added, especially in a country cause, that the defendant may join and strike commissioners names, sometimes in four days, and sometimes in a week, that the plaintiff may have a commission * *ex parte*, directed to his own commissioners; and this is also of course.

And to this is too frequently added, that publication may pass the first day of the succeeding term, if the motion or petition happens to be in vacation time, or the last day of the term (if moved on the first day of the term). As also that the plaintiff may be at liberty to set down his cause to be heard some time the same term. Now as to passing publication and hearing the cause, this is discretionary in the court, to do therein as they please; and the court is very cautious how they grant this part of the motion, since it is speeding the cause in an extraordinary manner, and beyond the ordinary rules of the court, and often clogs the paper of causes,

* On one side only.

so that it cannot be got thro' in any reasonable time, especially where there are a great number of causes then set down. And by the ancient rule of the court, there was always a term between passing publication and hearing the cause, to the end the suitors might have timely notice to prepare and get ready. Not but that there may be some cases where such an extraordinary order is absolutely necessary, as in the case of an injunction, which is kept on foot till the hearing, or where the plaintiff hath met with great delays from an obstinate defendant, or where the matter in question is purely an account between the parties; but the general observation is, that these orders for hastening on of causes, in this extraordinary manner, had better been left alone, for they but too often surprize the parties, and are the occasion of fresh trouble, and more motions to the court, to enlarge publication and put off the hearing; and unless the court is very empty of causes, which seldom happens, they had better deny such a motion.

Each party names four commissioners, for the examination of witnesses, and two a-piece are struck out of each side, the plaintiff hath always the carriage of the commission; but the court will in some cases indulge the defendant with a duplicate of the commission, especially if it is doubtful whether the plaintiff will execute his commission or not, and more especially if he is forced on by the defendant (as in an injunction cause, where delay is only designed). If the plaintiff, who hath the carriage of the commission, refuses to give notice of the execution thereof, or does

not intend to execute it, then the defendant may make use of his duplicate, and proceed to the examination of his witness by virtue thereof; but these duplicates are seldom asked for, and as rarely granted, but upon good reason offered to the court, and upon extraordinary occasions, or by the consent or agreement of the parties among themselves, and all commissions for examination of witnesses, are to be made returnable upon some one of the returns in or before the term, unless where the parties agree, that it shall be made returnable * *sine dilatione*, as sometimes happens.

Duplicates of commissions seldom granted.

If a defendant joins in commission, and names commissioners, and yet afterwards refuses to strike; the court, upon a petition, will strike out such two of them as they please, and the commission shall go to such of the four commissioners as are left standing.

There must be fourteen days notice given by the commissioners to all the defendants, of the time and place of the execution of the commission, for else it is not good notice, and the depositions will stand suppressed for irregularity, in not pursuing the tenor of the commission, but where it is a short vacation, as between Easter and Trinity terms, ten days notice or less is good. No commission can be executed in term time, unless by leave of the court, or consent of the parties; for the commissioners being generally country attornies, it is more than probable they are in town attending the term on their other clients affairs, No commission can be executed in term time without leave of the court or consent of the parties.

* Without delay.

and consequently cannot attend upon the execution of the commission.

If two of the plaintiff's commissioners attend at the time and place appointed, for the execution of the commission, they may proceed therein * *ex parte* (if the defendant's commissioners don't then attend). But if the defendant's commissioners attend, at the time and place appointed, and the plaintiff's commissioners are not there, they can't go on, because the plaintiff having the carriage of the commission, will not produce it, if he is disappointed of his commissioners, and consequently, there can be no proceedings for want of the commission; this makes a duplicate of the commission more necessary, for in that case, if the defendant's two commissioners meet, they may proceed in the execution of the commission; but where there is no duplicate, and the defendant's commissioners attend at the time appointed, and none appear for the plaintiff, the party aggrieved is to be recompensed in costs, upon complaint made thereof to the court; and in that case the court will give him leave to sue out another commission, and order him the carriage thereof.

One commissioner at least must attend on each side, for if the plaintiff hath but one commissioner that attends on his side, he can't proceed to execute the commission, unless one of the defendant's commissioners attends, and joins with him therein; but if one commissioner for each party attends, they

* On one side only.

may proceed in the execution of the commission, and not otherwise.

The commission being opened and read, both parties are obliged then to exhibit their interrogatories (if they intend to examine any witnesses) and consequently, if the plaintiff exhibits his interrogatories, and the defendant neglects to do it, and yet by his commissioners attends the execution, whereby they have an opportunity of hearing and seeing every thing that is proved on the plaintiff's part, and yet perhaps all this while they have exhibited no interrogatories, and after all this, it often falls out, that the defendant moves for a new commission upon suggestion, he had no opportunity of examining his witnesses at the last commission: If it shall appear to the court by affidavit, or certificate of the plaintiff's commissioners, that the defendant's commissioners attended during the whole time of the execution of the commission, and never exhibited any interrogatories; in this case, the court will never grant the defendant another commission, and he must take it for his pains, since he lay upon the watch and catch, only to see what the plaintiff proved, and then, at another commission, to exhibit interrogatories adapted to such matters and questions, as might tend to overthrow all that had been done; and he shall never be admitted to have this unfair advantage over his adversary, for if he is admitted, after having knowledge of all that his adversary hath proved, to exhibit interrogatories, he may easily conceive what interrogatories to exhibit, and how to hit the bird in the eye; and therefore
it

If interrogatories are exhibited, it is in the power of the court to grant or deny a new commission.

it is incumbent on him to exhibit his interrogatories, if he ask for a new commission, otherwise he can never have it, he ought at least to exhibit interrogatories; and in truth his commissioners ought to withdraw, but however, if interrogatories are exhibited, it is in the power of the court to grant or deny another commission (as the circumstances of the case upon affidavits, or the certificates of the commissioners appear).

And care must be taken (if a new commission is granted) that neither party add or alter their interrogatories; they must examine upon the old interrogatories, which were exhibited at the former commission, and are not to add any new ones, without special leave of the court, and they are to be settled by a master, and are never done but in extraordinary cases.

If the party examines some witnesses in town, and others by commission, he is not obliged to exhibit, or file his whole set of interrogatories in the examiner's office, he only files such as he hath occasion to examine to in town. But they must be the same as were exhibited before at the commission. If this were otherwise, it would put the plaintiff to a double expence in paying for copies of the whole interrogatories twice over.

If a commissioner is to be examined as a witness at the commission, he must first of all be examined by the other commissioners, after which he may join and proceed in the execution of the commission as a commissioner; for when he is examined as a witness,

ness, he hath nothing more to do but to act as a commissioner.

If a plaintiff wants to examine a defendant as a witness, he must obtain an order by motion or petition for that purpose; this order is of course, and must be served on the adverse party's clerk in court; the defendant may obtain the like order to examine a Co-defendant as a witness. But all these orders are upon a suggestion, that the defendant is not concerned in point of interest in the matters in question; and they are never granted but with a clause of saving just exceptions to the other side; and this must be made at the hearing of the cause; and this order for examining a defendant as a witness must be produced at the commission, or in the examiner's office, when the defendant attends to be examined, without which he cannot be examined, for it is by virtue of that order, and the authority given them by the court, that impowers them to examine him, and they cannot do it otherwise.

And tho' it is a fundamental rule of equity, *Rule.* that one defendant's answer cannot be read, so as to charge another defendant, no more than a decree can be made, upon the testimony of one single witness, against the flat and positive denial of a fact by answer; because the oath of the party is ever looked upon in equity to be as good as the oath of a single person.

Yet cases may, and do often fall out, wherein the court may ground a decree upon the oath of a single witness, attended with other circumstances to corroborate it; as where the
answer

answer of the party appears to be notoriously falsified, by which means it comes to lose that credit which otherwise it would, and ought justly to have; and it is conceived one defendant may be a very good witness for another, especially where he is not concerned in point of interest, in the matter in question.

Examination
of witnesses in
chief.

If a bill to
perpetuate the
testimony of

witnesses prays
relief, it will
be dismissed,

2 Vent. 366.

But yet the
plaintiff may
use the depo-
sitions at law.

2 Wms. 162.

Depositions
taken *de bene*
esse.

See Godb.
193.

And there is another method, for either party to proceed in the examination of their witnesses; as where one man brings a bill against another, and hath a most material witness to examine, upon affidavit made, that this witness is in a languishing condition, or in danger of dying before he can be examined in chief; or where the witness is going a long voyage to *India*, or other remote parts, from whence he cannot return by the time he is to be examined in chief, and to which place he is bound, and cannot possibly stay.

In either of these cases, the court upon motion, or the petition of either party, will and never denies to make an order, as of course, for leave to examine such a witness * *de bene esse*, saving just exceptions to the other side.

If the witness lives till he can be examined in chief, he must be examined over again, as other witnesses in chief are; but if he dies in the mean time, then upon producing, and proving the register of his death, the party for whose benefit he was examined, may apply by petition, or motion for an order, with liberty to publish his depositions (it cannot be published without such an order) and to the

* Conditionally.

petition

petition must be annexed the certificate of the death of the witness, and the party must shew that he died before he could be examined in chief; and hereupon the court makes an order, not only to publish his depositions, but to read him as a witness at the hearing, saving exceptions; and notice of this order is always given to the adverse party's clerk in court to prevent surprize, and to give him an opportunity to object thereto, as he shall see occasion.

If the witness beyond sea is not returned, there must be an affidavit of it, and that the party hath not heard from him for such a time; nor doth he know whether he is living or dead; and in this case there will be the like order as in the case of the witness, who died before he could be examined in chief.

Since by common experience, it is but too often found, that country commissioners publish and divulge all the evidence taken before them; and this even before publication, and that in such a manner that it is rarely or ever to be detected, because they disclose it only to the attorney or solicitor who employs them, and who is their friend; and since the very life and vitals of almost every cause, and of every man's property lies in keeping close, and secreting his evidence, till after the depositions are published, because after that, there is an end of examining, unless where it is to prove exhibits, which may be done after the hearing, or by order * *viva voce*, and then they must be particularly named in the order, that the

Where commissioners are upon oath not to divulge the depositions before publication.

* By word of mouth.

other side may have notice what is to be proved * *viva voce*; and this can be only to prove the execution of deeds or signing receipts or acquittances. A man can't have leave to prove a will * *viva voce* at the hearing, because the due execution may come in to question which can't be examined at the hearing * *ore tenus*, but ought to have been done before publication passed.

(a) They are so by the modern practice.

It would be highly necessary to think of some expedient to prevent the mischief of this growing evil, and it is conceived the country commissioners ought to be upon oath (a) (as well as the examiners are). The words of whose oath are to this effect, *viz.*

“ You swear, that according to the utmost
 “ of your skill and cunning, you shall well
 “ and truly execute, and exercise the office of
 “ one of the examining clerks under one of
 “ the chief examiners, in the King's court of
 “ Chancery, whereunto you are admitted;
 “ and you shall duly, justly, and impartially
 “ examine the causes that shall be committed
 “ to you, without any favour or affection to
 “ any person or persons, otherwise than of
 “ right appertaineth concerning the same.
 “ And you shall be attendant, as well to further the King's business, in the same causes,
 “ from time to time, as need shall require.
 “ And you shall not publish, or shew the
 “ same depositions, to any person or persons,
 “ before publication in the court, without
 “ consent of the same court. So help you
 “ God.”

* By word of mouth.

If country commissioners are by a general rule of the court, to be upon their oaths, there must be some variation in the oath from that above. It is conceived this may be added to the printed rules of the court, if the Lord Chancellor pleases, or thinks it necessary, to make such a standing order.

The examiners office extends itself, and has a right to examine all witnesses in town, or within ten miles thereof; and if any commission is made out, or witnesses examined within that district, the depositions taken by commission will upon complaint be suppressed; and the clerk who made out the commission, stand committed for a misbehaviour, and breach of the known duty of his office. And this happened in Mr. *Show's* case, one of the clerks in court, where the commission was executed, and the witness examined at a tavern in *Chancery Lane*.

If any practiser or other person, goes about to tamper with, or suborn any witness, upon complaint made thereof, and upon examination of the matter upon oath, he must stand committed.

Practisers
tampering
with, or sub-
orning wit-
nesses, to stand
committed.

When interrogatories are filed in the examiner's office, the witness is carried to the seat of the examiner, and a note in writing is there taken of his name and place of abode, to the end the other side may cross examine him, if they think fit; and to prevent the personating of any witness, he is constantly carried in person, and shewed at the seat of the adverse party's clerk in court; this being done he returns back to the examiner's office, and is there examined.

If

If interrogatories are filed for his cross examination, the party who produces him, is obliged to procure him to stay, or return and attend to be examined; but if no such interrogatories are filed, or he is not demanded to be cross examined at the same time, he is under examination; and if he goes away about his business, the party who intends to cross examine him, must get him examined as well as he can; and the adverse party is not in that case bound to produce him over again, to attend to be cross examined, since it was the party's fault he had not his interrogatories ready to have cross examined him, whilst he was under his former examination.

Neither the examinations or depositions, which are taken by commission, can be published in any case whatsoever, till publication is duly passed by rule in the office, or by motion or petition, for it may be done either way.

Publication
never enlarged
but upon
sufficient affidavits.

And therefore, when publication is moved for to be enlarged, it must be upon notice, and upon good reasons offered to the court, and upon affidavits, shewing the reasons why the party could not examine his witness sooner, and it is seldom or ever done, where it is to put off the hearing of the cause.

Or where the
adverse party
can suffer no
injury.

But where the adverse party can suffer no injury, as where the cause is not set down, or where the party is not served with a subpoena to hear judgment, there the court will enlarge publication upon asking for.

And in some cases they will do it, (tho' the cause is set down, and the party served with

with a subpoena to hear judgment); but this must be when it is shewed to the court, that it is not possible for the cause to come on very soon; and the court will in this case expect the party to appear * *gratis*, to hear judgment in six days, on notice being given to his clerk in court, and to pray no day over; and will often oblige him to take no advantage for want of parties at the hearing. This forwards the plaintiff, for if default is made at the hearing, the decree cannot be made absolute till the next succeeding term; but if the party, who moves to enlarge publication, will not agree to appear * *gratis*, and pray no day over, he is often denied his motion, and with great justice, because in that case he intends only delay, which the court always avoids when in their power.

If the examiner is served with an order, whereby publication is to pass on such a day, he cannot afterwards examine any witnesses, tho' it often falls out, that three or four witnesses have been before that time sworn to the interrogatories, but have not attended to be examined. In this case the party cannot examine them without leave of the court, which is seldom denied on motion.

If a witness is duly subpoena'd, to attend and be examined, and he refuses to attend, then upon certificate from the examiner, that interrogatories are filed, and the witness hath not attended to be examined, he shall stand committed, unless he attends, and is examined in four days after notice. And this is sometimes allowed as a good cause for enlarging

* Gratuitously.

L.

publi-

publication, or putting off the cause; but where publication is absolutely passed, and the depositions are delivered out, if the party moves to enlarge publication, he must suggest by affidavit, that some material witness is not examined, and the reasons why he could not attend and be examined before publication passed.

And in this case, the plaintiff or defendant (as the case falls out) must make oath, and so must his clerk in court or solicitor, “ That they have neither seen, heard, read, “ or been informed of any of the contents “ of the depositions taken in that cause; nor “ will they see, hear, read, or be informed of “ the same till publication is duly passed in “ the cause:” And upon such affidavit it is usual for the court to enlarge publication, and give the party an opportunity to examine his witnesses. But he is to be limited to a time, and so as not to put off the hearing of the cause, for otherwise it would be hard to put the defendant to hear his cause without proof.

There was a memorable instance of this kind, in my Lord *Sommers*’s time, where an artful solicitor got copies of his client’s depositions, and immediately went with them to the adverse attorney or solicitor, shewed him the depositions, and to make sure work of it, read them over to him; his adversary being ignorant of the rule, told him they must notwithstanding have an opportunity to examine their witnesses; and soon after bringing his witnesses to the examiner’s office, he was told they could not be examined, because publication was passed, and the depositions were

were copied and delivered out; the man being surprized at this, went to his clerk in court to know what must be done, the clerk told him of the affidavit before cited, at which he was startled; and told him the story. The court however enlarged publication, and gave the party an opportunity to examine, and the adverse solicitor very narrowly escaped a commitment for his male-practice.

When publication is passed, and the depositions are copied and delivered out, if either party has a mind to examine touching the credit or reputation of any of the witnesses, the way is this:

They must file objections or articles (so called) in the examiner's office; these contain in substance the objections they make to the reputation of the witnesses. As in cases of felony, burglary, perjury; forgery, standing in the pillory, or any other criminal case, that would disable the party from being a good witness at law (for the rule of evidence is the same in equity as at law). If the party cannot be a good witness at law, no more can he be in equity; or these articles may be founded on the party leading a lewd life, or being a common drunkard, or swearer, or of ill repute and character in his neighbourhood, a common vagabond, a man not known, or who hath no abode, or such like (tho' these latter objections seldom come to any thing), for notwithstanding all this, the man is a legal witness, therefore the court will hear his evidence, and judge of the credibility of it accordingly.

These articles being filed, and a certificate from the examiner that they are so, the court upon application by motion or petition, (or indeed it may be done without it) will give leave to the party to examine witnesses thereon. And the other party, who is to support the credit and reputation of his witness, may examine accordingly * *toties quoties*, and the depositions must be published as in other cases. But this is a case which very rarely happens, and generally speaking, it ends in nothing more than putting the party to an expence to no purpose.

When the depositions are thus copied and delivered out, and both parties come to see the interrogatories exhibited by each side, if they find them to be leading or impertinent, then is the proper time to refer them to a master for being too leading, impertinent, or scandalous; this is done by motion or petition of course.

If the master reports the interrogatories to be leading, and this report is not excepted to, then all the depositions taken to these interrogatories must stand suppressed as of course, by motion or petition; but if the report is excepted to, as on the one hand, the court never countenances leading or impertinent interrogatories; so on the other hand, they are not over curious in these matters, because it may fall out that the interrogatories may be reported leading in the very vitals of the examination, and on the very point on which the cause turns; and when this comes to be

* As often as he pleases.

the case, the party who refers them hath gained his end, for perhaps he had a very bad cause, if the depositions had stood; whereas if they are suppressed, he has a very good one (since his adversary must hear the cause without any proof at all) unless the court is pleased to grant him another commission on payment of his costs for his leading interrogatories, which is seldom or ever done, after the depositions are published; and it is hard that in equity a man should be deprived of a plain right thro' the slip of another man's pen, or the inadvertency or unskilfulness of his counsel's penning his interrogatories; and therefore if it is possible for the court to help him they will, from the manifest inconvenience which must attend such a case; indeed if the interrogatories are reported to be leading in points upon which the jett of the cause does not turn, and if the depositions in those points should be suppressed, and the party has evidence enough left without them, there is no hurt done; but if the very life and quintessence turns upon them, he will struggle to the last before he will let his depositions be suppressed, since he might have had the same answer to a fair question as to an unfair one. If the commissioners misbehave themselves, or if the commission is executed contrary to notice, or not due notice given to the party, or if the depositions returned by commission are so badly ingrossed, or so much interlined that they are not legible, in these and many other cases of the like nature, there may be good reason to suppress the depositions; but in this last case, the re-

cord or ingrossment of the depositions is always brought into court by the proper officers. The court takes the ingrossment into their hands, and if it is possible to be read, or if it is handed down to the fix clerk and he can read it, they will hardly suppress the depositions, or put the parties to new trouble, or to the expence of examining all the witnesses over again.

When the depositions are copied and delivered out, and signed by the examiner, or proper fix clerk (for without this they are not admitted to be read at the hearing, if either of the fix clerks, who constantly attends the court every day of hearing, stands up and says, the books are not signed) the plaintiff proceeds to set down his cause for hearing, either in court or at the rolls (he having his election where to hear it). The cause must be set down either by the fix clerks, who are generally allowed to set down eight or ten causes a-piece, as there are days left for them (for the fix clerks causes never begin till all the remainders are over); or the party may set down his cause by petition.

C H A P. VIII.

Of the Decree.

See Exchequer
rules 67.

AFTER publication is past, they move or petition the court for a day of hearing, and when the day of hearing is appointed,

ed, they take out a subpoena to hear judgment, returnable at such day of hearing, and this must, in all country causes, be served fourteen days at least before the day of hearing, so that on the act of court which appoints the day of hearing, the subpoena to hear judgment is supposed to issue; but it may issue any time after the cause is appointed to be set down for hearing, so that there be time enough to serve the party at least fourteen days in all country causes, before the hearing of the cause.

Subpoena to hear judgment must be served fourteen days before the hearing.

This subpoena is according to the notion of the civil law, that no act of the court may be made * *alterâ parte inauditâ*, and the service is made fourteen days before the hearing, that the other party may have time to take out the depositions, and prepare his counsel to speak to his proofs.

At the day of hearing, if the defendant appears, the plaintiff may obtain a decree; but if he does not appear, the plaintiff can only have a conditional decree, which is analogous to the † *primum decretum* in the civil and canon law, and this is to be pronounced upon affidavit of service of the subpoena fourteen days before the hearing of the cause, and likewise upon reading a word of the answer, to shew there was a § *lis contestata* in the cause, and after such decree pronounced, they must serve the defendant with it, and set it down sometime in the next term, and upon affidavit of such service, if the defend-

The proceedings in case defendant appears after served with subpoena to hear judgment. When he does not appear.

* Without hearing the other side.

† First decree.

§ Contesting of the suit.

dant does not appear, the plaintiff will obtain an absolute decree, which is analogous to the * *secundum decretum* in the canon and civil law.

Cause not to be set down the same term publication passes.

The cause is not regularly to be set down the term publication passes, because that is the term wherein they are to take out copies of the depositions, and prepare on both sides for the hearing.

The plaintiff in the term publication passes, may move or petition for an hearing in the ensuing term, or in the sittings after the term in which publication passes, if the subpoena to hear judgment can be regularly served, and returnable within time.

If the plaintiff don't move or petition for an hearing in the first term after publication passes, then the defendant may move or petition in the term following, to set down the cause at the defendant's request, because the plaintiff has then delayed the defendant by lapsing the time in which he was to hear the cause, and then, if the plaintiff don't appear upon regular service of the subpoena to hear judgment, upon affidavit of such service, the plaintiff's bill is to be dismissed absolutely, because there are not to be two decrees, since the plaintiff, who is the aggressor, ought always to be ready to maintain the justice of his cause.

The plaintiff hath one term after passing publication, to consider whether he will proceed to the hearing of his cause or not, and if he fails to set it down to be heard in that

* Second decree.

time, then the defendant is at liberty to set down the cause to be heard, * *ad requisitionem defendantis*, &c.

The cause being thus set down and entered with the register, the party (unless there be an interlocutory order to appear *gratis*) goes to the register's office, and takes a note of the day his cause is set down; for this note is carried to the subpœna office, where they make out the subpœna to hear judgment, and the note from the register is their warrant for making out the subpœna.

It is before observed, || that only three defendants can be put into one subpœna, and there being two labels, they must be first served on each defendant; and the body of the subpœna under seal is to be shewed to the party at the time of service, and the body under seal left with the last of the three defendants who is served; § for if the body of the writ should be left with the first defendant who is served, and the two labels with the other two defendants, this is by no means a good service, because the affidavit must be, "That the party who was served with the label was at the same time shewed the body of the subpœna under seal."

|| P. 39.
How subpœna is to be served.

§ See p. 41.

It is conceived that the labels ought to be left with the party himself, and that the leaving thereof with his wife or servant, has been often doubted, whether it be good service or not. It is agreed such service is not good, but the body of the subpœna may be either served upon the defendant, or left with his

A label ought to be served on the party himself.

* At the request of the defendant.

wife,

wife, or one of his servants, at his house or last usual place of abode; and it was never doubted but this was good service.

In town causes It seems to be a question, touching how many the defendant days notice the defendant is to have to hear must have ten judgment; but the received opinion is, that days notice in all town causes there must be ten days notice before the in all town causes there must be ten days notice hearing, four- from the day of the service, to the day of teen in country hearing judgment; and fourteen days notice causes. in all country causes, unless where the cause

is set down between Easter and Trinity term, which being an extreme short vacation, it has been thought that thirteen days notice is sufficient to hear judgment in a country cause.

A nobleman's When the cause comes into the paper, and cause is not to is called in its course; for if a peer of the be heard out realm comes upon the bench, tho' it is usual of its turn, un- (after the cause then in hearing is over) to call less by consent the nobleman's cause, yet if it stands low, of all parties. and the adverse counsel say, they are not ready, but will be so when the cause is called in its course: In this case the court never forces them to go on, unless both sides desire it; but the nobleman must stay till his cause is called, and comes on in course.

How to pro- The bill being opened, if the defendant ceed if the de- does not appear to open his answer, the court fendant does calls on the plaintiff to prove service; and an not appear at affidavit, which must be filed, being read of the hearing. the service of the subpoena to hear judgment, under the restriction above-mentioned; and it appearing to the court, that the defendant is regularly served to hear judgment, the plaintiff's counsel prays to have a word of the defendant's answer, and it is no further read than thus, viz. "The answer of *A. B.*
" defendant

“ defendant to the bill of complaint of C. D.
 “ complainant. The said defendant saving
 “ and reserving to himself now and at all
 “ times hereafter, all, and all manner of be-
 “ nefit and advantage of exception, &c.”

But the plaintiff's solicitor must take care to have the answer signed by the fix clerk, which if he fails in, and the fix clerk in open court, insists it ought not to be read, being not signed it cannot be read, and the plaintiff's solicitor must take it for his pains in neglecting to get the pleadings signed as he ought.

An answer must be signed by a fix clerk before it can be read.

The plaintiff's counsel pray what decree they please for their client * *nisi causâ*, and they generally pray a right decree, or otherwise they will hear of it again.

This decree being drawn up, passed and entered with the register, the plaintiff sues out a subpoena against the defendant to shew cause against the decree, and serves him therewith (as other subpoenas). But this writ to shew cause against a decree, being a judicial process, it must and always is made returnable in term time, and at a day certain (if it should be made returnable out of term, or at any of the feasts, as was once done) it will be set aside for being irregular, the words of the subpoena are † *ad ostendendum causam secundum ordinem curiæ gerentem datum tali die et anno*, &c.

A judicial process must be returnable in term, or at a certain day.

There is no prefixt time for the service of this subpoena, nor how many days notice the defendant is to have between the service, and

No prefixt time on a subpoena to shew cause why a decree should not be absolute.

* Unless cause. † To shew cause according to order of court bearing date such a day and year, &c.

the

the day to shew cause. It were to be wished it might be as in the case of subpœnas to hear judgment, tho' indeed where the decree is made at any of the days of causes within the seals after term, there the party has timely notice to shew cause; but where the decree is pronounced in term time, the party (if the subpœna is made returnable the same term, as may be) has but a very few days left to shew cause against the decree, and is sometimes straitned in time to do it.

If the defendant submits to the decree * *nisi*, then upon affidavit of the service of the subpœna to shew cause, and upon a certificate from the register that no cause is shewn, the plaintiff's counsel move to make the last order absolute on affidavit and certificate, which is a motion of course.

If a defendant shews cause why the decree should not pass against him, he must pay the costs of the day to be taxed by the master.

But if the defendant intends to shew cause, he must first pay unto the plaintiff the costs of that day's default in not appearing. The words of the decree are always thus, *viz.* "And this decree is to be binding upon the defendant, unless he being served with a subpœna for that purpose, shall at the return thereof shew unto this court good cause to the contrary." But before he is admitted to shew such cause, he is to pay unto the plaintiff his or her costs (as the case is) to be taxed by a master for this day's default in appearance.

These costs being paid, and a receipt for them produced, the defendant petitions to restore the cause again into the paper, which is always granted; but if a cause is called, and the defendant's counsel is ready, and appears, and

* Unless.

and no body appears for the plaintiff, the court always calls upon the defendant to prove service, and if he cannot do that, he cannot pray to have the bill dismiss. All the court can do in this case is, only to strike the cause out of the paper; but if the defendant proves service, the bill must be dismiss with costs. This service must be upon the oath of the party, *viz.* "That he was, on or about such a day served with a subpoena to hear judgment, at the plaintiff's suit:" or any other person with whom the subpoena was left, may make affidavit, and it must be filed before it can be read. The reason of this is, because a plaintiff may set down his cause, and yet upon further consideration of the matter, he may not think fit to serve the defendant with a subpoena to hear judgment. In this case the defendant must hear the cause * *ad requisitionem defendantis*, if he will have the bill dismiss with costs, tho' sometimes the defendant is caught there too, and a decree made against him.

If the defendant objects for want of parties, (as he may) unless restrained by some interlocutory order, whereby he is to take no advantage for want of parties; this is always to be done when the pleadings are opened, and before the cause is gone into, upon the merits.

If it appears to the court that a very necessary party is wanting, that without him no regular decree can be made; as where a man seeks for an account of the profits or sale of

Objection for want of parties must be made before the cause is gone into upon the merits.

Where the plaintiff's bill will be dismissed with costs for want of proper parties at the hearing.

* At the defendant's request.

a real estate, and it appears upon the pleadings, that the defendant is only a tenant for life, and consequently the tenant in tail cannot be bound by the decree; and where one legatee brings a bill against an executor, and there are many other legatees, (none of which will be bound either by the decree, or by the account to be taken of the testator's assets) and each of these legatees may draw the account in question over again at their leisure; or where several persons are intitled as next of kin under the statute of distributions, and only one of them is brought on to an hearing; or where a man is intitled to the surplus of an estate under a will after payment of debts, and is not brought on, or where the real estate is to be sold under a will, and the heir at law is not brought on. In these and all other cases, where the decree cannot be made uniform, for as on the one hand, the court will do the plaintiff right, so on the other hand they will take care that the defendant is not doubly vexed, he shall not be left under precarious circumstances, because of the plaintiff, who might have made all proper parties at first, and whose fault it was that it was not so done. And therefore, in all these cases it is conceived, that the ancient rule of dismissing the bill with costs, for want of absolute and necessary parties, is the surest way to go by.

Where the
cause will be
adjourned
over.

But to this it will be objected, that the late practice hath been to let the cause stand adjourned over on payment of the costs of the day, and to direct the plaintiff to amend his bill, and make proper parties. And in
many

many cases this is a very just rule and determination, as where the party wanting to be brought on, is purely a party * *pro forma*, as in the case of a trustee or an executor, against whom there needs no further examination of witnesses. Nay the court often directs to supply the want of parties, in case of an administration † *de bonis non*, &c. that upon the plaintiff's producing such administration, or any other administration, or probat of a will, before the master, that the account shall go on.

But where the party which is wanting, becomes a substantial and necessary party, and where he may controvert the plaintiff's very right to the demand in question, and where he may deny it by his answer, and put the plaintiff and the other defendants who have answered, to undergo a fresh examination of witnesses; for no body will say that the examination taken before the coming in of this new defendant's answer, shall either bind or affect his particular case. And where the plaintiff must reply to this new defendant's answer, and where both parties must examine all over again, and where the cause must also be set down § *de novo*, as against this new defendant, it is not conceived of what effect it can be to the plaintiff, to have his cause stand over, or where he is to find his account in the event of such a proceeding; and it seems in this case to be more just, that the bill ought to stand dismissed with costs, and that the defendants who are unnecessarily brought

* Out of form. † Of goods unadministered. § Again.
on,

on, should at least have their costs for this vexation; and that the plaintiff ought to be at liberty to bring a new bill, and make proper parties, as he shall be advised. But all this is in the breast of the court, to do as they please.

Eq. Abr. 280.
pl. 1. in the
notes.

An infant has
six months af-
ter he comes
of age to ob-
ject to a decree
made during
his minority.

If any one of the defendants appears to be an infant, and any thing is prayed against him by the decree; he must in all cases have a day given him to shew cause. The words of which decree are thus, *viz.* “ And this decree is to be binding to the said *A. B.* the infant, unless he shall in six months after he shall attain his age of twenty-one years, (being served with process for that purpose) shew unto this court good cause to the contrary.”

This process is by way of subpoena to be served on the defendant at his coming of age, and it is a judicial writ, and must be returnable in term time. If he shews no cause, the decree is made absolute upon him.

May make a
new defence,

and put in a
new answer.

But when he comes of age, and shews cause within the six months; even here it is said that of late it hath been doubted whether the infant shall put in a new answer or not, and make a new defence; if he is not admitted to do this, to what end was there a day given him to shew cause; and heretofore it was never doubted, but that an infant, when he came of age, might upon motion and with leave of the court put in a new answer, and make a new defence, if his guardian had not made a proper defence for him, or mistaken his case; and this seems to be grounded upon
the

the higheſt reaſon; for taking it for granted (which no body ever yet denied) that nothing can bind an infant, unleſs the act to be done, plainly appears to the court, to be for his benefit; and there it ſhall, and is ſupported by a multitude of precedents; why then ſhall he not by the indulgence of the court put in a new answer, eſpecially when it appears to the court, that the defence made during his infancy was totally wrong? Or if he is to be bound by his former defence, or by his former answer, to what end had he a day to ſhew cauſe? for if that defence is only to be gone upon, as the decree was juſt, then ſo it will be now; but if he is to make a new defence, or a new cauſe, it may vary from his former, and in that caſe the decree upon this new defence, may appear to be very unjuſt, and may be reverſed.

As in the caſe of a feme covert, where a bill is brought againſt her and her husband during coverture, and where he claims merely in her right, and then dies, and the right ſurvives to the wife. It was never here ſaid, but the wife ſhall file a new answer, and make a new defence, and draw into queſtion and examination the validity of the decree obtained againſt her during coverture, and avoid and reverſe it, if there is juſt cauſe for it. It ſeems the queſtion which was lately made about a new defence, to be made by an infant, is reſolved, that he may do ſo, and hath (as we hear) been lately ſo reſolved at the Rolls.

And ſo may a feme covert.

Wims's Rep.

504.

M

If

If plaintiff is
not ready
when his cause
is called on, it
shall be struck
out of the
paper.

If the plaintiff, when his cause is called on, is not ready, it shall be struck out of the paper, and he must apply by petition to have it set down again, but with this difference, that as he hath once had his turn, and might have been ready if he had thought fit, so he shall be postponed till after all the causes which are then set down are heard; and his cause must be set down, after all those which are then appointed and set down, and then he will have a second turn for the hearing of his cause.

How the re-
gister makes
up the decree.

The decree being thus pronounced, the plaintiff carries his brief to the sitting register of the day (for each register takes his turn alternately) and bespeaks the decree to be drawn up, and the defendant may bespeak a copy, and mark the register's book for a copy (if he thinks fit); each party draws up the decree as he finds it most in his client's favour; and when the decree is drawn up, and the copy returned to the register, (if there is any difference about it) the register appoints a day to hear both parties upon it, before it is passed; or if either party refuses to return his copy, the register sends him a note to return it by such a day, or he will pass it without him, and this is the method of the register's passing their decrees in court or at the Rolls.

If the minutes taken at the hearing are doubtful, or if either party thinks himself really aggrieved by the decree, as it is then going to be passed; or if he conceives the minutes are wrong taken, or contrary to the plain sense and meaning of the court, when the

the decree was pronounced, or if the register takes upon himself to pass the decree contrary to his minutes (as rarely or ever happens); or if there is a material or essential difference between the two registers minutes, before passing of the decree (for if it is passed they must re-hear the cause) and upon depositing five marks with the register, as a stake to answer costs to the other party, the court orders the register with his minutes to attend, and upon this petition, the court alters the decree drawn up as they think fit, and directs the register to pass it accordingly.

What deposit to be made on rehearing.

When the decree is passed by the register, it is carried to the entering book in the same office, and there entered; and all decrees and other orders made in Michaelmas and Hilary terms, are to be entered before the first day of Michaelmas term after; and all of Easter and Trinity, to be entered before the first of Easter following, or else the party must obtain an order to enter them * *nunc pro tunc*. And this is always upon notice to prevent any surprize.

If either party intends to re-hear the cause, they must take care to enter a caveat with the secretary of the decrees, and injunctions. And when the decree comes to be inrolled, he must summon the party upon his caveat, and give him notice of the decree being come to his hands; and the party hath thirty days from such notice given, to apply for a re-hearing of the cause, which if he fails in, the decree will be signed and inrolled, and then

The party hath thirty days after notice of decree to apply for a re-hearing.

* Now for then.

he hath no other remedy but by bill of review and reversal, which are hereafter stated.

As decrees are of very various natures, and depend upon the circumstances of the case, so there is no room left in this treatise to bring them to any certainty, but barely to hint at some of the proceedings consequent thereto; as where one man brings a bill against another, and where he is under no impediment of proceeding at law; yet even in this case, the court many times retains the bill for twelve months, and directs an issue, and reserves the consideration of the matter till after the trial, and will then decree according to the verdict.

As in the case of Hopkins and Stretch in Canc. in Ireland.

Where an order may be obtained for a new trial.

And tho' in all issues directed by the court of chancery, either party may apply for leave, and obtain an order for a new trial; yet this seldom comes to any thing, unless the judge before whom the cause was tried, certifies his dissatisfaction of the verdict, or that it is fit to undergo another trial, there the party shall have another trial, upon payment of the costs of the former trial.

Rule in equity that an heir shall not be bound down by one single trial.

But still it is taken as a fundamental rule of equity, that the inheritance of an heir at law, shall not be bound down by one single trial, he may have another trial for asking for; but if the second verdict goes against him, he will not be intitled to a third trial for asking for; and where verdicts have gone several ways, it has always been the wisdom and policy of the court to decree according to the majority of those verdicts, or else there would never be an end of the matter in question, and perhaps it may be better to deny another

another trial, than to have the parties in eternal dispute.

If an account is directed to be taken before Account. a master, and the defendant decreed to pay the ballance, in that case the plaintiff brings in his charge before the master in writing, and the defendant takes a copy thereof, and brings in Where the his discharge, and the parties attend thereon; parties will be and if an affected delay is used, the court will ordered to at- order the parties to attend * *de die in diem*, or tend de die in direct the master to speed his report, or make diem, the ma- it up by a limited time. ster to speed his report after a decree.

If the defendant is to produce deeds or writings, or to attend and be examined on interrogatories, the antient rule used to be to serve him with a copy of the writ of execution of the decree, and shew it him under seal, and at the same time to serve him with a warrant from the master, and give him a reasonable time to produce them; as where a man lived in *Northumberland* or *Cumberland*, he must have a longer time to produce his deeds, than where a man lived in or near the town; and by the ancient rule, no writ of execution was ever allowed to be made out, till after the decree was signed and inrolled.

As this rule was anciently pursued, so it seems to be well grounded, because the party had fair notice to produce his deeds, and an opportunity of shewing to the court his reason for not doing thereof. Whereas nothing is now more common than to take out two warrants from the master, which are served on the party's clerk in court, and on not produ-

* From day to day.

cing the deeds, and the master certifying his default, a motion is presently made, to produce them in four days or stand committed. And this order is served on the party's clerk in court; and how it is possible for a man to produce them in four days, who lives one hundred miles off, is not easily to be accounted for.

It is therefore conceived, that upon all these motions, for a man to stand committed in four days for not attending to be examined, or not producing deeds according to the decree, the question (tho' this seems to be a motion of course) ought to be asked, whether the party has been served with a writ of execution of the decree, and with a summonce from the master (served on the party) to produce them; if he hath, upon a certificate from the master, of their not being produced, or of his failure to attend and be examined, the party is left inexcusable, and in that case ought to stand committed; and as all commitments must be grounded upon some offence or other, so it hath been always taken, that the offence committed is by not paying obedience to the great seal; and the party may in this case proceed (if he pleases, by way of attachment); but why a man's liberty should be taken away, because the master upon two summonces certifies this default, is not very easy to be accounted for; notwithstanding this is a practice now used, and it is a very old, but true saying, that no offence can be committed but where the great seal is shewed the party. Indeed this is not so in extrajudicial matters, as in cases of bankrupts and idiots, because
they

they are never put under seal; and the offence in that case is for not yielding obedience to the order signed by the Lord Chancellor, Lord Keeper, or Lords Commissioners, when shewed to the party, against whom it is made.

When both parties have been fully heard upon the account, the master prepares a draft of his report, and thereof gives notice by a summonce for that purpose, for either party to come and take a copy thereof. And after this, there are four days time allowed to bring in objections to the draft of the report, and they must be in writing, and the parties are heard thereon (if desired); and if no objections are brought in, the master proceeds to sign his report, at the return of his second summonce.

The ancient rule was, that the party should never except but where he had first objected to the draft of the report before the master, and where there was no objection brought in, it was allowed as good cause to discharge the exception; and it were to be wished, that this good rule was strictly followed, since if the party had objected, he might have shewed the master his error, and the report would have been altered in that particular, and never troubled the court. Whereas it often happens, that the party will conceal some material objection, and keep it in * *petto* from the master; and when this comes on by way of exception, it makes a variance in the report; and so it might have done, if it had

* His own breast.

been fairly disclosed and laid before the master; nor hath the other party any previous notice upon what ground such an exception goes, or upon what foundation it stands. And it is but too often said, that particular matter was never stood upon, or insisted on before the master, and that it is a new matter which the party never heard of before. As this way of practicing but too often surprizes the party, so it generally ends in being sent back to the master to review his report, and hear the parties thereon; whereas if the old rule was kept up, *viz.* that neither party should except, but where they had objected before the master; and if this was allowed as a good cause (as certainly it ought to be) either by motion, or coming on of the exceptions to discharge them, it would very much tend to the ease of the court, and prevent abundance of trifling exceptions.

The report when signed by the master is taken away, and carried to the report office and there filed (this is an office belonging to the register's office, and either party moves in open court, it cannot be done by petition) to confirm the report * *nisi causa*; this is always done upon eight days personal notice to the party; if he shews no cause, then upon an affidavit of the personal service of the party, and a certificate from the register that no cause is shewn, the last order is made absolute of course.

* Unless cause.

But

But if the party intends to shew cause, his Counsel must counsel must prepare and sign his exceptions, ^{prepare and sign excep-} he may have time upon petition or by motion, ^{tions.} to file his exceptions beyond the eight days, as where the account hath long depended before the master, or where the exceptions are very numerous, and there is not time to file them in the eight days or the like.

These exceptions are carried to the register, ^{Five pounds} and five pounds deposited as a stake to an- ^{deposited} swer costs; if the adverse party is put to ^{thereon, and} twenty or thirty pounds expence, upon ar- ^{no more al-} guing these exceptions, he hath no more than ^{lowed on ar-} the five pounds deposited, which is ever held ^{guing them.} (tho' often complained of) as a recompence for that trouble; and the master never allows more than the five pounds, in respect of that proceeding, when the costs come to be taxed. It is so in a re-hearing of any cause, if one, ten pounds is to be deposited; if a cross cause, twenty pounds is the deposit; and this is a recompence for that re-hearing.

The exceptions being thus filed, and the five pounds deposited, it is a motion of course, to stay proceedings on the report, on exceptions filed; either party may bring on the exceptions by petition, but never by motion; if the exceptions are numerous (as but too often happens), there being sometimes twenty, or thirty, or forty exceptions to a report, which take up two or three days hearing; and where the exceptions appear very frivolous (as also too often happens) the exceptant must pay, * *ultra* the five pounds deposited, ten shillings

* Besides.

for every exception, and branch of an exception, which is over-ruled; but if the exceptant waves any of his exceptions, it doth not fall within this rule, because in that case the court hath no trouble, where the exception is waved; and there is a clause always added to the order, made on arguing the exceptions, that with these directions, (that is the directions given, on arguing the exceptions) the report shall stand confirmed, and no man can except to the same matter twice over (nor can he add to, or alter his exceptions after filed), but by special leave of the court for that purpose.

If a duty is decreed, how the master will order the payment.

If a duty is decreed, and the court leaves it to the master to appoint time and place for payment, it is usually appointed to be paid at the chapel of the Rolls, between ten and twelve; but where the master is not directed to appoint time and place, he always directs payment to be made to the plaintiff generally, pursuant to the order on the hearing.

Report being confirmed, the party makes out a writ of execution of the decree and report.

The report being thus confirmed with or without exceptions, and the duty fixed and established, the party proceeds to make out a writ of execution of the decree, and of the report, order to confirm * *nisi*, and the order to make it absolute; all these are contained in the writ of execution, and are put under seal (a true copy being made thereof); the party is personally served therewith, unless he absconds, and then upon affidavit made thereof, the court will order that service of his

* Unless.

clerk in court shall be good service of the party, and the seal must be shewed to the clerk in court at the time of service; and as is before observed, there can be no writ of execution till the decree is enrolled; the duty is demanded of the party by a letter of attorney under the hand and seal of the plaintiff, empowering the person who serves the writ of execution to demand and receive it.

No writ of execution till the decree is inrolled.

But if the duty is made payable at the Rolls chapel, the party or his attorney who is appointed to receive it, must wait there from ten to twelve; and if no body comes, or the duty is not paid, being demanded, upon affidavit of service of the writ of execution under seal, and a demand made of the duty, and a refusal of payment, the clerk in court, by the ancient rule, always made out an attachment for breach of the decree (the proceedings whereon are herein before stated); but the late practice hath been to move for a commitment, and if the old rule of the court is to be altered in any case, it seems reasonable in this, *viz.* To shorten the process of the court in case of a breach of a decree; for if the whole process of the court is in this case to be run over again from attachment to the sequestration; it may be near twelve months before it can be regularly done. And if the party runs away in the mean time, the suitor (after being kept out of his debt many years) may by this delay lose his demand; yet even here all practitioners doubt whether this way of proceeding by commitment, answers the chief end of its

its late institution; however this is discretionary in the court, to do it or not, as they please.

C H A P. IX.

Of the Bill of Revivor.

IF the party died pending the suit, by the civil and canon law, they had a * *citatio ad reassumendam causam*, but then it must appear to the judge by the proof, that the party was dead, for it was not enough for the judge to know it in his private capacity, but it was necessary that it should be proved judicially to him; but this process lay only against the heir of the defendant, and for the heir of the plaintiff, and so from heir to heir † *usque ad conclusionem in causâ*, and even after sentence, to have execution of the sentence pronounced.

Who is intitled to a bill of revivor.
See Pract. Reg. in Ch. 44, 49.

Analogous to this in the court of chancery, is the bill of revivor, and the subpœna § *ad revivendum*, is the same as the * *citatio ad reassumendam causam*; and this subpœna is only for the heir, executor, or administrator, who came in in privity, as they call it, that is in immediate representation to the party litigant deceased; for a devisee or assignee of any plaintiff cannot have subpœna § *ad revivendum*,

* Citation to reassume the cause. † Even to the conclusion of the cause. § To revive.

after the decease of such plaintiff; and this is for two reasons:

First, Because they looked upon a suit to be a * *chose* in action, which was not assignable over for fear of maintenance; but this reason has been long since obsolete in the court of chancery, where they allow the assignment of such interest.

But the second and better reason is, because where the party devises or assigns his interest and dies; if the devisee or assignee were to bring his bill of revivor against the defendant, the heir or executor would be pretermitted, who might have a right to contest such disposition, and therefore he must bring his original bill, and make the heir or executor a party.

There is no answer absolutely necessary to a bill of revivor, for the cause will stand revived without any answer, because the subpoena brings the representative into court, and being there, upon motion after the return of the writ, the cause shall stand revived against him; for when the heir don't shew any thing to the contrary, the appearance of the ancestor by the attorney continues to him, as if there had been no demise; but the defendant may for his benefit put in any plea or answer, and shew that he is not heir, or has not the like interest, or that there is not the same cause of complaint against him.

The bill of revivor must pursue the original bill, because otherwise it is not a revivor of the same suit; and if there be a variance between that and the original bill in any material point, the defendant may demur, and upon

Ch. Caf. 123,

174.

Eq. Abr. 2.

P. 1.

No answer

necessary to a

bill of revivor.

Plaintiff must pursue the original bill, otherwise good cause of demurrer.

* Thing.

upon such demurrer the bill of revivor shall be dismissed; but if any thing happens by the abatement, that makes it necessary to add a new charge, that may be inserted in the bill of revivor, as the plaintiff may pray a discovery of assets in the hands of the heir or executor, and the defendant shall be obliged to answer thereunto.

Cause can't be revived in part.

A cause cannot be revived in part, but the whole proceedings, bill, answers, and orders made in the cause, must stand revived, for the revivor is but a continuance of the same suit; and it cannot be a continuation of the same, unless it proceeded where the other left off.

How to revive in cross causes.

Proceedings in cross causes are not revived without a bill of revivor in each, because each plaintiff is master of his own cause, and therefore if the plaintiff revive against the heir of the defendant, that does not make it necessary that the heir of the defendant should revive the cross cause against the plaintiff, unless he pleases.

Need not revive against feme sole, who marries after having answered.

If a * *feme* sole answers, and afterwards marries † *pendente lite*, this does not put the plaintiff under a necessity to revive the proceedings, because she by her own act cannot alter the condition of the plaintiff's suit, but by leave of the court the husband may be made a party, and if in such case the plaintiff brings a bill of revivor, it shall be dismissed with costs, because no suit can be revived that was never abated.

Pract. Reg. in Ch. 1.
Note; No suit can be revived that was never abated.

* Woman.

† Pending the suit.

But if a * *feme* plaintiff marries, here by her own act she abates her suit, because she has no power to continue any judicial proceedings; for by the marriage, it is transferred to the husband, and therefore the husband must exhibit his bill of revivor to recontinue the suit; but in the former case, the husband took her with the suit attached to her.

Pract. Reg. in
Chan. 1.
Husband of
feme plaintiff
must revive.

If a bill be exhibited against † *baron* and * *feme*, and the husband dies, the suit is abated, and a bill of revivor must be exhibited against the wife, because she is not obliged to abide by the answer, which was put in under the power of her husband.

In a suit against
baron and
feme, if baron
dies plaintiff
must revive.

But if a man and his wife be plaintiffs and the defendant answers, and the husband dies, the wife has it in her election whether she will exhibit a new bill, or proceed on the old one by revivor; for she may change her cause of complaint or not, at her election, because the former suit was commenced, when she was under the direction of her husband.

When feme
plaintiff has it
in her election
to revive or
exhibit a new
bill.

Where † *baron* and * *feme* are plaintiffs, touching a promise made to them to make them leases for their lives; there, if the wife dies, the husband need not revive, because he claims in his own right, and not in the right of his wife.

If a * *feme* sole exhibits her bill, and marries, and the defendant answers, and after would take advantage of the plaintiff's proceedings without revivor, the defendant shall be examined upon interrogatories, whether before his answer, he knew of the plaintiff's marriage; and if so, then the plaintiff shall proceed without revivor, for there is no need to sub-

sub-

* Woman.

† Husband.

* Wife.

subpœna the defendant to appear, where after knowledge of the abatement, he appears and answers **gratis* without it, and he waves the benefit of the subpœna by the answer.

Rule.

It is an universal rule, that wherever a death happens, and yet the right survives, and the cause is in the same plight and condition after the demise, as it was before, there is no need of the revivor, because no other person is to be sent for, nor any other person to be made party to the complaint.

But where the right does not survive, or there is any alteration by the death of any of the parties, there you cannot go on without revivor, because there will not be proper parties, unless all parties in interest be before the court; and if there be an alteration by death, all parties in interest cannot be before the court, unless the representatives of the deceased be brought into court.

If an executor † *durante minore ætate*, exhibits a bill, and the infant comes of age, there needs no bill of revivor; because it is a continuation of the same representation.

Pract. Reg. in
Chan. 45.
2 Ch. Caf. 80.

If there be several plaintiffs, and the defendant dies, some of them may proceed without the rest to revive, because the obstinacy of some of the parties shall not hinder the rest from asserting their interest; but it seems proper to make such former plaintiffs defendants, that they may be concluded in interest for not joining.

* Gratuitously.
fant.

† During the nonage of an infant.

If

If a plea of outlawry stands allowed whereby the suit is put off * *sine die*, and afterwards the outlawry is reversed, the plaintiff must bring his bill of revivor, because that suit being abated, the defendant has no day in court, and therefore must be brought into court by a new subpœna.

After a decree is signed and inrolled, if the defendant dies, they may have a subpœna † *scire facias*, which will revive it against the heir or executor of the defendant; this was formed from the † *scire facias* at common law, for when the decree is inrolled, it is in nature of a judgment, and a subpœna † *scire facias* is, that the heir or executor may shew cause, why there should not be execution.

There can be no demurrer put in to the subpœna † *scire facias*, for that subpœna is not of record, nor any where filed, and therefore the defendant must upon motion shew cause at the return of such writ, why he should not be charged.

As they have a subpœna † *scire facias* after inrollment, so they may have a bill of revivor, for the † *scire facias* is formed according to the notion of the common law, and the bill of revivor upon the canon and civil law; and therefore in a court of equity, the plaintiff has his election of either of the remedies.

If a single woman brings a bill, and marries pending the suit, it is abated, and she and her husband must revive, and serve a subpœna § *ad revivendum*; and the time for answering

Ch. Caf. 50.
2 Freem. 180.
Danv. 779. p.
1. Eq. Abr. 41.
p. 12.
Gilb. Eq. Rep.
234.
3 Chan. Rep.
15.

Pract. Reg. in
Chan. 1.
Eq. Abr. 1. p.
1. in the notes.

* Without day. † To shew cause. § To revive.

N being

being out, it is a motion of course to revive the proceedings.

Ibid.

But this is not so, where a bill is brought against a single woman, for if she marries the suit is not abated, it goes on against her and her husband, without any revivor.

Ibid.

If a plaintiff dies pending a suit, it is abated, and his executor or administrator must revive the cause before he can proceed therein; and all these orders for the revival of proceedings must be served on the adverse clerk in court, to the end he may take notice the suit is revived, and that such revivor is right, and no motion can regularly be made, till the order for reviving the proceedings is served.

Ibid.

So if a defendant dies, the suit is abated; and if it is a personal demand against him, the bill must be to revive and answer, and the subpoena is * *ad revivendum et respondendum*. And this bill prays either an admission or discovery of assets, from the legal representative of the dead party.

It is generally held, that if the executor, or administrator of the dead defendant, admits assets sufficient in his hands, to answer the demand in question; this is good, but in some cases the court will not allow it to be so, tho' this rarely happens: indeed if the heir, or executor sets forth the yearly value of the real estate subjected to debts; this is good, because the real estate cannot run away; but after an admission of personal assets, it may be in the power of the party, either to waste or run away with them; for in this case, no-

* To revive and answer.

thing but the person of the party is at stake ; and there may be cases where two executors are appointed, one refuses to act, and the other, who is insolvent, possesses the whole assets ; and therefore when any of these cases appear to the court, or where the party, who possesses the assets, is in dubious circumstances, The court will it is no new thing for the court to oblige him oblige the executors, &c. to set forth the very assets * *in specie*, to the end the plaintiff may pursue and follow them, set forth the assets in specie and know where they are, and how to come if they see occasion. at them ; but this rarely happens, and is only done in extraordinary cases.

But where strangers, or even debtors to the estate, are made parties to the bill of revivor, and a discovery of assets sought thereby, as against them, they shall never discover them to any one but to the executor or administrator of the party, who alone can recover them, especially where the executor or administrator, by his answer, hath admitted assets ; for a stranger, where there is no privity of estate between him and the testator, shall never sue strangers who are no ways accountable to him.

Indeed if the executor or administrator appears plainly to the court to be insolvent, cases may be found out, where the court will lay their hands on the assets ; but this scarce ever happens, nor can the court strictly speaking oblige any executor to give security to answer the debt. It was the testator that made him his executor, and appointed him to stand

* Specifically.

in his place, and if he wastes or runs away with the assets, there is no helping it.

If an executor or administrator, upon a bill of revivor, does by his answer admit assets; and the plaintiff, upon coming in of the answer, revives his suit, and proceeds in the original cause upon the revivor, he shall never afterwards refer the answer for insufficiency; for this he ought to have done at first, and before he proceeded to revive the original cause, his doing whereof is an admission, that the answer was full and perfect, or otherwise he might have excepted thereto, and had the opinion of the court thereon; but then he could not have proceeded to revive, till he had got over that point.

A subpoena scire facias is only after inrolment and not before.

If a decree obtained against the ancestor is sought to be carried into execution, there are two ways of doing it. If the decree is inrolled, the party may sue out a subpoena against the heir, to shew cause against the decree; but this is only after an inrolment, and not before, and the party must, at the return of the subpoena shew cause, if he hath any, against the decree.

Or the plaintiff may bring his bill of revivor to carry the decree into execution; and this is the surest and safest way; for where the decree was obtained against the ancestor, and his heir does not claim under that title, but by virtue of another title paramount, there the decree can never be carried into execution against him; as where an estate is decreed against a man, and his heir insists his father had no title thereto, or was only tenant for life thereof; the decree in that case can never be

be carried into execution against him, he is at liberty to controvert the justice and validity of that decree; he may make a new defence from what his ancestor did, and vary his case as he shall be advised, and the parties go into a new examination of the matter, and hear the cause * *de novo*, and the court judges whether the decree is right or not, and may affirm or reverse it at their pleasure.

But where one man obtains a decree against another for a real estate, and the party dies before the plaintiff is put into possession; in that case, if the heir at law claims the estate by descent under his ancestor, or as devisee under him, he shall never controvert the justice of the decree, tho' his ancestor should have mistaken his defence; nor shall he be at liberty to make a new defence, or enter into new proof, so as to overthrow the former decree, especially where it appears to the court, that the decree hath been of an ancient standing.

No bill of revivor can be brought where it relates to costs only, unless the costs are taxed, and a report made in the life time of the party; for this is † *actio personalis & moritur cum personâ*. Bacon. But if, by the decree, the party is to pay a sum of money, or if a duty is decreed, if he is to deliver over a bond, or deeds or writings, or if any thing is annexed to the decree, besides costs, the suit may be revived, but it can never be revived for costs only.

* Again. † A personal action, and dies with the person.

A bill to discover a deed against a mortgagee or jointress, whereby the plaintiff would defeat their title, shall never have a discovery, unless the plaintiff will confirm the title.

Devise of lands, and testator afterwards mortgages, it is a revocation *pro tanto* only.

So if a bill is brought by an heir at law, or by any other person, against a mortgagee or jointress, whereby the party would avoid the jointure or mortgage, under pretence his ancestor was only tenant for life; and if he seeks for a discovery of deeds and writings, to avoid the title of the mortgagee or jointress, he shall never have such a discovery, unless he by his bill submits to confirm the title, and then he shall.

And so if a jointress prays a discovery, against an heir at law, of deeds and writings, if the heir submits by answer to confirm the jointress's title, she shall have no such discovery.

So if a man makes his will, and afterwards mortgages his estate, it is but a revocation * *pro tanto*, and the devisee shall redeem, and the estate go to him, and not to the heir at law.

C H A P. X.

Of the bill of review, and of the appeal.

Maranth. 362.

TH E sentence by the canon and civil were two fold, interlocutory and definitive.

The interlocutory was any orders pronounced by the judge in the cause touching the proceedings, before they came to a definitive

* For so much.

sentence,

sentence, and the interlocutory order is always alterable before the definitive sentence. Ibid. 362, n. 7. 364. n. 21.

The definitive sentence must always be in writing, and cannot be altered after it is pronounced and signed by the judge; but after it is so signed, they might appeal to a superior jurisdiction; but where they were in the last resort, as when it came up to the prince, there they might appeal from the prince uninformed, to the prince better informed, which was in nature of a review of the same sentence. Ibid. 363. n. 13. Andreas Val- len. 383.

Thus it is in the court of chancery, for all orders are interlocutory, till they come to the definitive sentence, which is signed by the court; for that sentence signed and inrolled is the definitive sentence in the cause, and all preparations before that, are but interlocutory; for the decree pronounced on the hearing, which is taken down by the register, is but an interlocutory sentence, till it comes to be signed by the judge of the court and inrolled.

Hence it is, that if the counsel are dissatisfied with the sentence or decree, as it is first pronounced, they may sign a petition for a re-hearing, and the court will grant one re-hearing at least, before they sign and inroll such decree.

Upon this re-hearing, any exhibit may be proved * *viva voce*, as upon the original hearing; but no proof can be offered of any new matter, without special leave of the court, which is seldom granted. Any exhibit may be proved viva voce on a re-hearing.

* By word of mouth.

When such decree is pronounced, * he for whom such decree passes, is to make out a draft of the same, which is to be shewed to his counsel, who finding the same agreeable to what was pronounced by the court, is to subscribe his name thereunto, and then such draft is to be delivered to the attorney of the adverse party, to consult his counsel, who is likewise to subscribe the same, or otherwise to give his exceptions in writing under his hand to the said draft, within eight days after the same was delivered to the attorney; and if he delivers any exceptions, the difference is determined by the court, but if no such exceptions are delivered, then the officer is to make it upon the notes, according to the draft perused by the counsel, in whose favour the decree passes; and in all cases, the officer first signs such decree, and then it is signed by the judge, which is an authority for the officer to inroll it among the records of the court.

When such decree is inrolled, it can never afterwards be altered without a bill of review and reversal, unless there be an apparent error in casting up the sums upon the face of the decree, for that being a meer mistake of the officer in drawing up the decree, and only the error of the clerk, it may be rectified upon motion without a bill of review; so likewise, if some part of the decree be omitted in the inrollment, that may be corrected upon motion to the court, because it

* Quære; If this not disused in modern practice.

is likewise * *vitium scriptoris*; and therefore, by leave of the court, it may be corrected and set right.

If there be any error in the judgment of the judge, that cannot after inrollment be corrected, but by the bill of review, and this cannot be filed but by leave of the court, because the chancery being the court of the prince, and in the last resort, the decrees of the prince are not to be changed or altered, without leave.

And this is never done but upon terms, the first is, that obedience be actually paid to the sentence, as far as it can be paid without prejudice to the right of the party in the cause so to be reviewed; for if such obedience be not paid to the sentence, it is presumed that such bill of review is only brought for delay, and not upon any real grievance to the party; but where the sentence is performed in manner aforesaid, there it is plain that such bill is for the sake of right, and not for delay.

But where the performance of the decree would prejudice the right of the party in the cause to be reviewed, as where the decree is to deliver up deeds or to cancel them, there the plaintiff is not obliged to perform such decree, on exhibiting his bill, because if he should prevail on such review, the court cannot by their decree put him in the same state and plight he was in before; and so if the court see good cause, they can dispense with the performance of any part of their

* The transcriber's fault.

decree, upon giving good security for the performance.

The second requisite is, that a sum of money be deposited in court, to answer the expence of such bill of review; at first it was but ten pounds, afterwards twenty pounds, and now it is risen to fifty pounds.

Thirdly, They can examine to nothing that was in issue in the original cause, unless it be any matter happening subsequent, which was not before in issue, or upon matter of record, or writing not known before; for if the court should give them leave to enter into proofs upon the same points that were in issue, that would be under the same mischief, as the examination of witnesses after publication, and an inlet into manifest perjury.

|| Co.Lit. 303.

6 Rep. 45.

Wood's Inst.

471.

Princip. Leg.

&c. 43.

After a dismission of the first bill of review, there can be no other, because it would be infinite, and * *expedit reipublicæ ut sit finis litium.*||

None but parties and privies, as heirs, executors, or administrators, can have this bill of review, since no body else can be aggrieved by such decree, because it can only be revived upon such privies.

Where a duty is decreed no bill of review can be brought till the duty is paid.

No bill of review can be brought to reverse or set aside a decree, till after the decree is inrolled, and the party deposits fifty pounds on the bringing thereof; and where a duty is decreed, no bill of review lies till the duty is paid, and the decree performed, unless in some special cases, where the court will per-

* It is for the public good that law suits be determined.

mit

mit the party to do it, on giving security to perform the decree; where deeds and writings are decreed to be delivered up, the party must do it before he is admitted to bring his bill of review; but where the party is by the decree to extinguish his whole right to the thing in question, as where he is either to convey or release his right, he shall in this case be admitted to bring his bill of review before that is done; for otherwise when his right is extinguished, there is an end of the bill of review.

The bill of review is to assign proper errors against the decree and proceedings; it must be error apparent upon the face of the record of the court; since the court cannot judge beyond that. If any new deed is found out, or a new discovery made since the hearing, which the party had not knowledge of at the hearing, and hath since then come to the knowledge of it; he must annex an affidavit of that matter, and pray an answer of the adverse party, and he must, upon filing his bill of review, serve the party with a subpoena ** ad revivendum*.

Bill of review is to assign proper errors against decree, &c. and if any new matter arises after the decree, which the party could not possibly come to the knowledge of at the hearing, he must annex an affidavit of it.

The party generally speaking puts in the usual demurrer, that there is no error in the decree; he rarely or ever answers unless ordered thereto by the court. There was one precedent where such a demurrer was allowed, tho' the party had since the decree, come to the knowledge of two letters, which seemed to overthrow the decree, and all the proceedings dependant thereon; and the court in that

* To revive.

case

case would not put the party to answer to those two letters, but allowed the demurrer. The reason given in this case was, that the party might have found out these letters before the hearing, since he had them in his own custody; and if this practice should take place, it might overthrow all the decrees in the court; and if this should be allowed as a precedent, a man might take up his defence when he pleased; whereas his whole defence ought to be made at once, and before the hearing. It is said the lords reversed the allowance of the demurrer, and ordered the party to answer to the bill of review; but this precedent may be found out whenever there is occasion for it.

Certainly the reversal in the house of lords was right; for the letters relating to the partnership were found after the decree, which the party had no knowledge of, though they happened to be in his custody, they ought to be taken under consideration even after a decree signed and inrolled; but then the party in whose custody the papers were, must give an account of their manner of coming to light; and in this case these letters were sent in trunks from *Hamburg*, where he had no reason to suspect there were any papers relating to the cause; so the finding of them was as much casual after the decree as if they had not been in the party's custody; and any matter casually coming to light after a decree, that would make an alteration in the decree, ought to be taken into consideration upon a bill of review; and therefore they reversed that part of the decree

decree which established the demurrer to the bill of review, without compelling the defendant to such bill of review, to answer to the letters.

The demurrer being set down to be argued, the court proceeds to affirm or reverse the decree, and the prevailing party takes back the fifty pounds deposit.

As there are always six months allowed the party to inroll his decree, if he comes to inroll it after that time, he must apply by petition to the court to inrol it * *nunc pro tunc*, and this is always granted; but it is conceived such an order should be passed and entered with the register, the proper repository for all those orders; and though this is never done, yet a case may fall out, where it may be of fatal consequence to the party; for suppose one of the errors assigned by the bill of review should be, that by the ancient rules and practice of the court, the decree is to be inrolled by such a time, and yet upon the face of the inrollment it appears to be inrolled afterwards, without any leave or order of the court for its being so; for the day of signing the decree always appears upon the face of it; and if it falls out that there is no order entered with the register to inroll the decree * *nunc pro tunc*, how will such an error or mistake be ever cured or got over; and therefore it were to be wished, that all those orders to sign decrees * *nunc pro tunc*, were entered with the register, to obviate a fatal error which one time or other may fall out.

There should always be an order when a decree is to be signed *nunc pro tunc*.

* Now for then.

And

And much less (according to late practice) is ever an order signed by the master of the rolls, to sign and inroll a decree, when the time is elapsed, * *nunc pro tunc*, thought a sufficient reason for the lord chancellor to do it, because it is his hand alone that gives sanction to the decree; and though it is made at the Rolls, this is nothing, because the decree when inrolled is the decree of the court, and the conclusion is, “It is therefore this day, (*viz.* such a day and year) **Ordered,** “ **adjudged and decreed** by the Right “ Hon. Sir *Robert Henly*, Knt. Lord Keeper “ of the Great Seal of *Great Britain*, and by “ the power and authority of the high and “ honourable court of chancery, ordered, “ adjudged and decreed, (so and so).”

And how is it possible for an inferior officer (as the master of the Rolls is) to direct the superior officer to sign and inroll the decree, or how the great seal can justify the doing of this by any authority but their own, where it is solely lodged, deserves consideration.

Appeal from
Chan. to the
lords is upon
a paper pe-
tition.

Vaudry v.

Pannell, 2 Rol.

Abr. 318.

K. p. 3.

3 Bulst. 116.

Roll Rep. 246.

331.

1 Bacon's Abr.

584.

Towards the latter end of King *Charles* the first, the house of lords asserted their jurisdiction of hearing appeals from the chancery, which they do upon a paper petition, without any writ directed from the King; and for this their foundation is, that they are the great court of the King, and that therefore the chancery is derived out of it, and by consequence, that a petition will bring the cause and record before them. This was long

* Now for then.

con-

controverted by the commons in the reign of *Charles* the second, but is now pretty well submitted to, because it has been thought too much, that the chancellor should bind the whole property of the kingdom, without appeal.

As to the execution of the decree, when the decree is * *in rem*, there an injunction is awarded by the decree of the court, to put the party in possession, which issues immediately.

But when the decree is † *in personam*, then there is a writ of execution of the decree, and in chancery the decree itself is inserted in the body of the writ, and in the exchequer, annexed to it.

If the defendant does not perform it, on affidavit of service, and of the non-performance, an attachment issues, so proclamation, commission of rebellion, serjeant at arms, and sequestration.

But if the sheriff returns § *cepi corpus*, and lets him to bail, which he should not do, where the writ is marked for the execution of the decree; there a sequestration is granted immediately; so if he be brought up by || *ba. cor.* and lies by it in the *Fleet*, and will not perform the decree, a sequestration may be granted, for the writ of execution for non-performance of the decree, makes him ** *contumax*; and the ancient way of punishing the

No bail on an attachment for the non-performance of a decree.

Comyn's Rep.

264. p. 145.

Cases of Pract.

C. B. 14. 100.

* Against the estate. † Against the person.

§ I have taken the body. || Have the body, a writ so called, because it commanded the sheriff to *have the body* on such a day and at such a place. ** In contempt.

con-

contumany was by imprisonment; but after the sequestration process obtained, then it was not thought enough to punish the evil conscience of the party by imprisonment, but likewise to compel him, where he appeared to be a prisoner, to make satisfaction*.

When plaintiff must take out a subpoena scire facias.

Where a man does not proceed on a decree for a year and a day, the plaintiff must have a subpoena † *scire facias*, or bill of revivor, because the decree, as well as the judgment at law, after such time, is supposed to be released, discharged, or performed, and therefore the defendant ought to have a day in court to shew it, which he cannot have, without such process.

C H A P. XI.

Of injunctions, elections, supplicavits, and ne exeat regno's.

Injunctions are of various kinds.

INJUNCTIONS are of various kinds; there are many things which the parties are enjoined from committing and doing, which cannot be here taken notice of.

* *A motion for a sequestration against a prisoner in the Fleet, for not paying the rents and issues of an estate to a receiver appointed by a decree of this court, was denied by my Lord Keeper Henley; his Lordship being of opinion, that it was too much for a court of equity to order double execution. Note; the register produced a precedent of such an order made by the late Lord Chancellor Hardwicke, on a like occasion; but his Lordship thought the circumstances of the present case were different: and this was between the Attorney General and Tancred at the last seal before Hilary term 1758.*

† To shew cause.

Where

1. Where tenant for life is committing of waste, in cutting down young timber, or breaking up or plowing ancient meadow or pasture, or doing other waste, the tenant in tail shall have an injunction upon certificate of filing of the bill, and shewing an affidavit of waste committed; and this till answer and further order, for timber once cut down, cannot be set up again.

2. If a man be tenant for life without impeachment of waste, with remainder to his first and every other son in tail, though by virtue of that clause (without impeachment of waste) he may fell timber, and alter any rooms of the house at his pleasure; yet if he should pull down the house, or any part of the buildings thereunto belonging, in spite of the heir, the court of equity would injoin, but not if he pull down to rebuild; for though the clause (without impeachment of waste) gives an absolute property in the timber, that then he may do what he will; yet he is but tenant for life of the lands and houses, and therefore if he pulls them down in order to vex a son that has obliged him, he acts with an ill conscience, and therefore a court of equity may injoin him, because he acts against conscience. See Lord Bernard's case, *Gilb. Eq. Rep.* 127. *Pre. Ch.* 454. ^{2 Ch. Cas. 32.} S. P. declared by the court.

3. So it is for building on another man's ground, injunction shall go to stay this new building till answer and further order; and so in the case of stopping up ancient lights; and so in the case of a patent to prevent the printing and selling of almanacks. But the patent

tent under seal is always produced in open court.

Injunction to be relieved against a penalty.

4. If one man brings an action at law against another, and a bill is brought for relief either against a penalty, or to stay proceedings at law; in that case the plaintiff shall move for an injunction (it is never done by petition) he may move either upon an attachment, or praying a * *dedimus*, or further time to answer.

For it being suggested in the bill, that the suit is against conscience; if the defendant be in contempt for not answering, or prays time to answer, 'tis contrary to conscience to proceed at law in the mean time, and therefore an injunction is granted of course.

As this is the common and usual injunction, so it only stays execution touching the matters in question, and there is always a clause giving liberty to call for a plea to proceed to trial, and for want of it to obtain judgment; but execution is stayed till answer or further order.

Injunction to stay trial at law.

5. There is yet another injunction, which is an injunction to extend to stay trial. This is never granted but upon notice, as where one files his bill, and it appears to the court, that the plaintiff's equity must arise out of the defendant's answer; in this case the court will, and often does grant an injunction, and that the same may extend to stay trial.

A perpetual injunction.

6. There is another injunction, called a perpetual injunction for quieting a man in the possession of his estate; this is generally either

* Commission.

upon a plain equitable title, or where one, two, or more verdicts have gone against a man. This injunction is to quiet the plaintiff, and his heirs for ever, and all claiming by, from, or under him; and this is very often granted, and in many instances the justice of the court calls for it.

Lord *Cowper* in *Lord Bath and Sherwin's* case, ruled that he could not stay trial, if there were never so many verdicts in ejectment, where the title was merely at law; but *quære* the reason of his resolution, because if the plaintiff at law be vexatious, and that appears to the court, as it will after many trials, it seems that the plaintiff at law proceeds with an ill conscience, and therefore will be enjoined.

Gilb. Eq. Rep.
2. Ch. Pre.
261.

7. There is another injunction to prevent multiplicity of suits, as where many suits are depending, and are likely to happen from one and the same thing. The court will here interpose, and grant an injunction; they will direct a proper issue to try the whole, and all the rest shall be bound by the verdict, or else there might be twenty actions and as many verdicts, where one proper direction or issue ends the whole, and it is only directing one issue to prevent many more.

Injunction to
prevent mul-
tiplicity of
suits.

8. There are other injunctions which are never denied, as in an ejectment, where the party agrees to give judgment in ejectment to prevent trial, to give a release of errors, and to consent not to bring a writ of error; and to this it is sometimes added, to deliver possession, as the court upon hearing shall direct. This forwards the defendant at law, and he

Of dissolving
injunctions
upon coming
in of the an-
swer.

could have no more, if he were to proceed to trial.

9. The methods of dissolving injunctions are various; when the answer comes in, and the party hath cleared his contempt by paying the costs of the attachment (if there is one); he obtains an order to dissolve * *nisi*, and serves it on the plaintiff's clerk in court; this order takes notice of the defendant's having fully answered the bill, and thereby denied the whole equity thereof; and being regularly served, the plaintiff must shew cause at this day, and the defendant's counsel, where there is no probability of shewing cause, may move to make the order absolute, unless cause shewn sitting the court.

The plaintiff must shew cause either upon the merits, or upon filing of exceptions; if upon the merits, the court may put what terms they please upon him, as bringing in the money, or paying it to the party, subject to the order of court, or giving judgment with a release of errors, and consenting to bring no writ of error, or to give security to abide the order on hearing, or the like; and to this order is generally added a clause, that the plaintiff shall speed his cause to an hearing.

If the plaintiff shews cause upon exceptions filed, he must procure a report in four days of the insufficiency of the answer; and if the motion is made at either of the last seals after Hilary or Trinity term, the court sometimes puts the plaintiff upon opening the ex-

* Unless.

ceptions, and they judge whether they are material or not. The reason of this is, because the defendant (if the answer should be reported sufficient) hath no opportunity to move the court, till the seal before the next term, and is thereby greatly delayed. If the court thinks the exceptions material and necessary, they will grant the motion; if otherwise, they will deny it, as the case appears; and there is, or at least should be always added this clause to the order (especially when the motion is made at the last seal), that the plaintiff shall procure the report in four days, or his injunction to stand dissolved without further motion; whereas it is not so in open term, or at any of the seals save the last; and this clause being added, the court need not hear the exceptions opened, which oftentimes take up too much time.

If the master reports the answer sufficient, it is a motion of course to dissolve the injunction; and whereas of late it hath been doubted whether, as the plaintiff undertakes to procure the report of the insufficiency of the answer, which being found against him, he shall afterwards shew cause on the merits, there seems no foundation for this objection, and it would be the hardest case in the world if it should be so; for there are many instances where the plaintiff's counsel may think the answer not full, and yet may be mistaken; and notwithstanding this, the plaintiff may have good cause on the merits for continuance of his injunction, and he ought to have liberty to do it; but this must be done on notice given to the other side; he cannot do it when

the defendant's counsel come to move to dissolve the injunction, on the answer being reported sufficient; because as this is a motion of course, the party is not prepared to speak to the merits, but he may, and ought to have liberty to do it on notice given.

The late master of the Rolls, whenever the party petitioned to receive exceptions, the time for filing thereof being out, always added a clause, that it should be so, but so as not to continue an injunction; and this clause was often wondered at, and never rightly understood, and is of late left out, for where there was no injunction at all, that clause was superfluous.

If plaintiff dies who is in possession of an injunction, the suit is abated.

10. If the plaintiff who hath an injunction, dies pending the suit, in strictness, the whole proceedings are abated, and the injunction with them; but even in this case, the party shall not take out execution without special leave of the court, he must move the court for the plaintiff to revive his suit within a limited time, or the injunction to stand dissolved; and as this is never denied, so if the suit is not revived, the party takes out execution. There are some instances where a plaintiff may move to revive his injunction; but as that rarely happens, so it is rarely granted, especially where the injunction hath been before dissolved; but where a bill is dismissed, the injunction and every thing else is gone, and execution may be taken out the next day; and this was never yet doubted.

Of breaches of injunctions.

11. As concerning the breach of injunctions, it hath been of late practiced to commit the party on personal notice given him, but never on

on notice to his clerk in court ; but the old rule was to proceed by way of attachment, and it would prevent daily inconveniencies, if it were strictly held to, for otherwise a man is committed and at once deprived of his liberty, and cannot move or petition, but * *in vinculis*, unless the court otherwise give leave on a petition to hear him.

12. Whereas by the ancient rule, where a man is guilty of the breach of an injunction, upon affidavit made thereof, the plaintiff's clerk in court issues out an attachment against him of course, he is arrested thereon, gives bail to the sheriff, and enters his appearance with the register, so the court has hold of him ; the plaintiff files interrogatories in the examiner's office to examine him ; the interrogatories are † *verbatim* according to the affidavit ; and if the party does neglect to attend and be examined, it is a motion of course to examine him in four days, or stand committed ; if he confesses the contempt he must submit, own his fault, beg pardon, and pay costs ; but if he denies it by his examination, the plaintiff descends to prove it upon him ; he may cross examine the plaintiff's witnesses, but is not admitted to examine any one witness himself ; then the plaintiff moves to refer it to a master, to see whether the party is guilty of the contempt laid to his charge, or not ; here again he hath liberty to be heard, and may except to the report, and bring it on for the judgment of the court, and if the court is of opinion that he is guilty of the

* In custody. † Word for word.

contempt, he must stand committed and pay the costs; but if the court is of a contrary opinion (which often happens), he is acquitted with costs. So careful hath the court always been of depriving a man of his liberty, that they have provided all these just cautions of his being heard before he stands condemned (as in the case of a commitment he at once is); and however necessary it may be, to shorten the process of the court after a decree, yet in this case, which is only mesne process, it is hoped the old rule will be kept up, and the short way of committing discountenanced as much as may be.

Indeed it hath been lamented, that after a decree, the process of the court should be very long and tedious to be gone through; and it hath been often thought, that upon an attachment made out against the parties, and * *non est inventus* returned, the next process ought to be a sequestration, or at least a commitment, which the court have of late fallen into for breach of decrees; but this is never to be done in mesne process.

Of elections;
the defendant
must first an-
swer before he
can oblige the
plaintiff to
chuse whether
he will sue at
law or in equi-
ty.

As concerning elections to be made by the party, where one man brings his action at law against another, and his bill in equity for the same matter, and at the same time; the defendant must first answer the bill, and then he shall put the plaintiff to his election in which court he will proceed; this is a motion of course, for the party to make his election, he has by the order, which is served on his clerk

* Is not found.

in

in court, eight days to shew cause, why he should not make his election. Eight days to shew cause.

If he elects to proceed at law, his bill in equity must stand dismissed with costs; if he elects to proceed in equity, an injunction issues to stay proceedings at law. This election is filed in the report office, and signed by the plaintiff's clerk in court, and is the ground work and authority for making out the injunction, if he elects to proceed in equity.

But this election doth not hold in all cases, for if the suit in equity is not for the same matter, he shall not be put to his election. If the bill is a bill of discovery only, and no relief prayed, he shall not be put to his election, for perhaps from that discovery he may be enabled to proceed at law, and without it he cannot.

And upon this head there seems to be a plain failure of justice, which hitherto has never (as we know of) been taken into consideration: as for example, suppose the plaintiff elects to proceed in equity, and his bill upon the hearing is dismissed with or without costs, all the benefit the defendant (who is doubly vexed with it) hath, is only to have his costs, and to plead it in bar to any new bill brought against him for the same matter; for a dismissal, for want of prosecution, upon an interlocutory order, is not pleadable; but this injunction, for stay of proceedings at law, is gone by the dismissal; and the plaintiff in that case is at liberty to proceed at law, which was never the intent of the court at the time of putting him to his election; for the order of election is, that the plaintiff is prosecuting

A dismissal upon an interlocutory order is not pleadable.

secuting at law and in equity for one and the same matter, and therefore he is called upon by the justice of the court, to elect in what court he will proceed, but still he is not to proceed in both courts.

Well then, he takes his fate in equity, and finds that court against him; and when he has done there, he shall take another course at law, which is thought to be a great hardship, and it were wished, that by the wisdom and justice of the court, it were remedied.

But the defendant hath remedy in this case, for he may file a cross bill, and have a perpetual injunction at law, and then, though the plaintiff's original bill is dismissed, yet the defendant may have a decree upon his cross bill.

As concerning SUPPLICAVITS.*

Of supplicavits, and when granted.

This is a writ wholly appertaining, and is made out by Mr. *Edward Pearson*, the deputy prothonatry of the court of chancery. It is granted upon complaint and oath made of the party, where any suitor of the court is abused and stands in danger of his life, or is threatened with death by another suitor, the contemnor is taken into custody, and must give bail to the sheriff; and if he moves to discharge the writ of supplicavit, the court hears both parties on affidavit, and continues or discharges it as the case appears before them. If they order the contemnor to give security for his good behaviour, (for this writ is in the nature

* See Har. Ch. Pract. 232.

of a lord chief justice's warrant to apprehend a man for a breach of the peace), he must do it by recognizance, to be taken before one of the masters of the court, who must be in the commission of the peace; he is to find sureties to be of his good behaviour. If he beats or assaults the party a second time, the court will order the recognizance to be put in suit, and permit the party to recover the penalty, for the recognizance is never to be sued, but by leave of the court; but this proceeding very rarely or ever happens.

So if any suitor of the court is arrested either in the face of the court, or out of the court, as he is going and coming to attend and follow his cause, (for so far the court does and will protect every man) upon complaint made thereof, sitting the court, they will send out the tipstaff, and bring in the bailiffs and prisoner into court instantly, sitting the court, and they will order them forthwith to discharge him, or lay them by the heels, and the plaintiff in the action, upon complaint and oath made thereof, will certainly stand committed; he shall lie in prison till he petitions, submits, and begs pardon, and pays the costs to the other party.

A suitor of the court being arrested in court will be discharged.

So where a clerk in court or solicitor is committed for male-practice, or misbehaviour of his known duty, after he hath lain in custody sometime, the court will discharge him upon petition signed by him, wherein he must beg pardon, be sorry for his offence, and pay the costs of the contempt.

As

*As concerning * ne exeat regno's.*

Of ne exeat
regnum's.

This writ issues upon the plaintiff's making affidavit of the debt defendant owes him, and that he is going out of the kingdom.

V. Prax. Canc. for the form of the writ, vol. 1. 136.

This writ not discharged until the party gives security to abide the order on the hearing.

The sum due is indorsed on the back of the writ.

This is called a state writ, and therefore it was said, it was to be tenderly made use of, but now it is become the common process of the court. The plaintiff, by a standing order made in my Lord Cowper's time, is to make oath of his debt, and the writ is always marked for the sum sworn in the affidavit, in words at length, and not in figures, and the plaintiff swears the defendant is going out of the kingdom, which if he should do, the debt may be lost. The order is, till answered and further order; and it was formerly thought, that upon the party's putting in a full answer, the writ should be discharged; but of late the party hath been obliged to give security to abide the order on the hearing, before the court will discharge the writ, which security is taken by recognizance before a master, as all other securities are, and it is in the penalty of what is sworn due, and the sheriff takes bail accordingly, when he arrests the party thereon; the sum sworn due, being constantly indorsed on the writ, as a guide for the sheriff to take bail by. See form of the writ *Har. Ch. Pract.* 228.

As concerning INFANTS.

Prochien amy shall pay costs.

No infant can bring a bill but by a prochien amy, and he must take care of it, for if the bill be dismissed, the prochien amy must

* Writs to prevent the party's going out of the kingdom.

pay

pay the costs thereof. 1 *Strange* 708. 2 *Wims.*
Rep. 297.

Where a bill is brought against an infant, ^{Infants must} he must (if in town) appear in court, and have ^{defend by} a guardian assigned him, by whom he ^{guardian.} must defend the suit; if in the country, he sues out a commission to assign a guardian, and put in his answer, and whether he pleads, answers, or demurrs, still it must be done by his guardian; for if it is the plea, answer, or demurrer of the infant, without doing it by his guardian, it will be irregular.

But where the infant neglects to appear, or to have a guardian assigned him, it is a motion of course (he being in contempt to an attachment) to pray for a messenger to bring him into court, and when he is there, the court always assigns him a guardian; but it is doubted whether this can be done against a peer of the realm, who is an infant, and whose person is sacred.

As to costs: wherever the court decrees the party to pay costs personally; in that case the master taxes them, and the party proceeds by a subpœna and attachment for recovery thereof; but where the court directs they shall be paid out of a real or trust estate, they must follow such estate, and not the person of the party. If the estate is sold, the costs are usually paid out of the purchase money, or out of the profits in the receiver's hands; or if the party who is to pay them, has sufficient profits in his hands, the court will direct him to pay them thereout, or send it to an inquiry before a master, whether there is sufficient for that purpose or not.

It

It is said that in the court of exchequer, if a man brings a bill for five thousand pounds, and only recovers five pounds, that the defendant shall pay him his costs thereout; but this is not so in chancery, for the party shall have only costs so far as he prevails in his suit, and it shall be referred to a master to distinguish the same; and this rule is founded upon good reason, for if a plaintiff sets up four demands, and only prevails in one, it is unreasonable he should have costs throughout, he must pay costs where he doth not prevail: and the general rule is, for him to have his costs so far as he hath prevailed, and no further, and to lose all the rest of the costs at least (if he doth not pay costs to the other party). In this case the master looks over all the folios of the bill, answer, depositions and proceedings, and only allows the usual fees of such folios and proceedings which relate to the matter prevailed in, and no further, and the plaintiff loses all the rest (as he ought) for setting up a demand which he had no foundation for, and for harrassing a defendant without any just cause.

No exceptions
to be taken to
the taxing of
costs.

By a standing order of the court, made in my Lord Keeper *Wright's* time, no exceptions were allowed to a report of taxing costs; and this rule hath ever been pursued, but with this difference, that where the master allows such costs, as ought not to be allowed, or are not allowable by law; in this case, the court will sometimes indulge the party with liberty of excepting touching this point only; but this very seldom or ever falls out, tho' in some cases it hath been done.

Wherever a clerk in court or solicitor, petitions to have his bill taxed, the court never refuses it; but upon debate it has been settled, that the court cannot go so far as to order the client to pay what it is taxed at: this must be recovered by action at law or otherwise, as the party shall be advised, and here it is taxed as between a client and his solicitor, and not as between party and party, for many things are not allowed upon a taxation between party and party, which however are allowed between a client and his solicitor.

But if a client petitions to tax his clerk in court's or solicitor's bill, he shall submit to pay what is due, and the court always puts this upon him, and the order is drawn up to pay what shall be found due on the taxation, for it is unreasonable for the client to ask a favour of the court, and then put his clerk in court or solicitor afterwards to recover at law what his bill is taxed at, nor hath the court any hold over him, but where he submits to pay, and where the order is to pay what shall be found due on this taxation; in that case, the clerk in court or solicitor, whose bill is taxed, may take out a subpoena for what the costs are taxed at, and proceed by way of attachment for non-payment, as in other cases; and this becomes a personal demand upon his client.

As concerning scandals and impertinencies, in any of the bills, answers or other records of the court, these are always referred to a master, and the costs must be paid on which side the report falls.

And as to scandals, there are many cases Of scandal. in which, though the words in the record are
very

very scandalous, and highly reflecting upon the party, yet the court does not think them so, especially where they are material and tend to a discovery of the very point in question; for a man may be guilty of a very notorious fraud, or a very scandalous action, as in the case of a brokerage bond, given before marriage, to draw in a poor woman to marry; or in the case, where a man is falsely represented to have a great estate, when in fact he is a bankrupt; or where one man is personated for another, or in the case of a common cheat, gamester, or sharper about the town; in these and many other instances, it may appear to be very scandalous, and not fit to remain upon the records of the court; and yet perhaps without having an answer to this very matter, the party may lose his right, for a spade is a spade, and the court always judges whether, though the matter may * *prima facie* be scandalous, it is of absolute necessity to be so, and if it materially tends to the point in question, and is become a necessary part of the cause, and material to the defence of either party, the court never looks upon this to be scandalous.

But where the scandal is altogether immaterial, and foreign to the point in question, and where it no way relates to the merits of the cause, but is done purely out of pique and malice, because one man is offended, that another brings a suit against him; in all these cases, where the master reports it scandalous, there the court will order the master to ex-

* At first.

punge it out of the record, and give the party costs for this vexation; and though costs are only awarded, and even directed to be taxed, yet the masters generally allow full costs, and at the end of the bill, there is an article of twenty, thirty, forty, or fifty pounds, which the party may be supposed to suffer in his reputation by means of this scandal; and it is discretionary in the master to allow what he pleases thereof, and they constantly make such an allowance as the circumstances of the case call for.

Impertinencies are where the records of the court are stuffed with long recitals, or with long digressions of matters of fact, which are altogether unnecessary and totally immaterial to the point in question: as where a man will tell a tale of a tub, where he sets forth a long deed, which is not prayed to be set forth * *in hæc verba*, where he stuffs his answer with long recitals, which are nothing to the purpose; as where a bill of revivor is brought, and the party will set forth * *in hæc verba*, not only the original bill and answer, but the whole proceedings in the cause; whereas all these being matters of record, and of which the party hath once paid for copies, he ought not to pay for them over again, nor is there occasion to set them forth over again * *in hæc verba*, or to make an unnecessary repetition thereof, for they ought to be set forth very concise and short; as where a man brings a bill of revivor, grounded upon an original bill and proceedings, he needs to set forth

* Literally.

no more thereof, and the best drafts-men in the age have in that case gone no further than thus, *viz.*

Directions
how to draw
a bill of reviv-
vor.

“ That your orator in or about such a
“ time, exhibited his original bill of com-
“ plaint in this honourable court, to be relie-
“ ved touching certain matters and things
“ therein contained, as by the said bill duly
“ filed, and remaining of record in this ho-
“ nourable court, appears (and carry it no
“ further), that the defendant such a day, put
“ in his answer, as by the said answer remain-
“ ing of record appears, That witnesses being
“ examined, publication passed, and the cause
“ being at issue, came on to be heard such
“ a day, when it was ordered and decreed,
“ so and so.” And here are taken in the
words of the ordering part of the decree very
shortly, and no more than what is material
to the revivor, and the register’s recital of the
bill and answer is wholly omitted, as being
altogether foreign to the matter of the revivor;
and if this should be in the bill of revivor,
it would be impertinent to the highest degree,
because when a decree is inrolled, it is never
done from the register’s recitals, which are
very often mistaken, and in no case regarded;
for notwithstanding these recitals, the bill and
answer must be always read, if any dispute
arises thereon; and it is from the original
bill and answer upon record, that every decree
is inrolled, and not from the register’s recital
in the decree, which in no case is regarded;
or if this short method is not pursued by the
drawer of the bill of revivor, yet he must
take care that in the recital of the former pro-
ceedings,

ceedings, he does them in the shortest manner possible (the shorter the better), since they can be of no use to his client; for the records of the court are the same, whether truly or falsely recited, and from them alone the fact must be determined; but if they are set forth * *in hæc verba*, they are highly impertinent, and will be found so, and must be expunged with costs; for all the defendant hath to do by answer to the bill of revivor is, only to set forth, that he believes there was such a suit, decree, and proceedings, and refers to the records. And as it is hard for the suitor of the court, to pay costs for this impertinency, when he knows nothing of the matter, and it is altogether the fault of his counsel to stuff the record with impertinency; so it sometimes falls out, that the court will pass a censure upon the counsel, who signed the bill or answer with this impertinent matter in it; and it is no new thing, and precedents may be found, where the court has ordered the counsel to pay the costs hereof out of his own pocket; and in this case it makes counsel more careful how they stuff bills or answers, or other records with tautology, and impertinency; and the same rule ought to hold in exceptions to a report, for there some counsel will sign fifteen or twenty exceptions, which may entertain the court two days or more, and perhaps most of them are only dilatory, and found to be most frivolous and vexatious; and they ought for the ease of the court to be discouraged wherever met with,

* Literally.

and the court is of necessity, to take notice of the counsel, who signed so many frivolous and idle exceptions.

If opprobrious language is spoken of the court, it has always been thought sufficient to grant an attachment * *nisi causa*, upon an affidavit, and to give the offender a day to shew cause; but where there are two affidavits, 'tis conceived he must stand committed without more ado, and answer the contempt † *in vinculis*.

And so where any person is assaulted or abused in his service of the process of the court, the court will protect him therein; and it is conceived, that in this case, the oath of the party is sufficient to ground an attachment or commitment against the offender, without any notice to be given him; for who is to prove the abuse but the party abused? he may attend in court and shew the very wounds he hath received; and this abuse is often done in so private a manner, that there is no way left to prove it but the oath of the party; and if this should be discouraged, no process of the court will ever be served, and the court are bound to justify their own honour and authority in this particular point.

But a nobleman or peer of this realm may abuse the party who serves the process upon him § *toties quoties*, for his person being sacred, the court cannot come at him as they do in the case of a commoner, || *quod est durum*.

* Unless cause.
pleases.

† In custody.

|| Which is hard.

§ As often as he

As concerning agreements, which are frequently signed by the parties, their clerks in court and solicitors, and are afterwards desired to be made an order of court, the court generally asks what they are for, or whether there is no infant or feme covert in the case; if there be, the court cannot make the agreement of the parties an order of the court, because no infant or feme covert can be bound thereby; and it were to be wished this question were asked of the counsel, when motions are consented to in open court, *viz.* That there is no infant or feme covert in the case, and many a plaintiff is caught even at the hearing of the cause, where an infant is defendant, and admits the equity of the bill by his answer; for notwithstanding such an admission, yet the plaintiff must prove every thing against an infant (as if his whole equity had been denied), because an infant is incapable of admitting any thing whatsoever to his prejudice, and the court is bound * *ex debito justitiæ*, to take care of all infants that come before them, because they are not able to help themselves, to look after their rights, as men of full age are, and therefore the court is bound to do it of them.

If a plaintiff who brings a bill lives beyond seas, or if after the bill is brought he goes beyond sea, and is out of the reach of the process of the court, he shall upon motion and affidavit of this matter, be obliged to give a bond of forty pounds penalty to the two fix clerks, not towards the cause, to an-

* Out of due justice.

fewer costs before he shall be at liberty to proceed further in the suit. It is conceived this is all he is obliged to do (though there be ever so many defendants, who put in separate answers), and this hath been thought a hardship, but it is conceived the rule is, that one forty pounds shall do for the whole.

If a plaintiff, who upon the face of his own bill appears to live abroad, as in *Smyrna*, *India*, &c. he must give security to answer costs, and if it is necessary to bring a cross bill, the service of the subpoena on his clerk in court, shall be ordered to be good service without the usual affidavit, because on the face of his bill it appears he is out of the reach of the process of the court.

So where an action at law is brought by one man against another, and the plaintiff at law cannot be found to be served with a subpoena, upon affidavit made thereof, the court will order service of the attorney at law to be good service of the party, to compel him to appear, and answer the bill.

So where a man hath been an inhabitant of *England*, and is removed or gone away, so as not to be found, the court, on affidavit, will order, that leaving a subpoena at his house or last usual place of abode, shall be good service, without which there would be a total failure of justice; and if the plaintiff claims title to the estate in question, the court will in such case as this is, appoint a receiver, who is to receive the rents and profits, and give security to account 'till answer, or further order.

So

So if a person makes a will in *Jamaica* or *Barbadoes*, or any of the *English* plantations, and a party who lives in *England*, has occasion to bring a bill here, if he finds out that a party who lives abroad, hath given a letter of attorney to a man in *England*, to act on his behalf; if he employs a proctor here to prove the will, in order to get in the effects of the dead man here in *England*; in this case it hath been held, that the service of a subpoena upon that proctor, or upon the person who hath the letter of attorney from the man abroad, shall be good service, to compel the foreigner to appear and answer the bill; for without it, there would be a failure of justice. It was so held in the case of a will made in *Barbadoes*, and where both the executors lived, and if the party abroad refuses to appear and answer, there shall go a sequestration to sequester his effects in *England*; and it is much doubted whether a sequestration may not be executed in *Barbadoes*, *Jamaica*, or any of the *English* plantations.

Where a man is committed for an offence done to the court of chancery, it hath been said that the court of law will grant him an * *Habeas corpus*, and remove him to their own prison; but it is hoped the authority of the supreme court of chancery is not at so low an ebb as to endure such a practice, for as the offence was done to them, another court cannot properly judge of it, and it is hoped a court of equity will exert their authority so

* A writ so called, because the emphatical words of it are, *have the body*.

far as to order the defendant to be remanded into the *Fleet* prison, and to direct him to be actually confined within the walls of the prison.

Where the court will order the party to be close confined.

So it is where a man lies in prison for breach of a decree, or any other contempt of the court, he never thinks of paying the duty, or doing justice, whilst he is a prisoner at large, and hath *Ludgate-Hill* to walk upon; and therefore it is every day's practice, upon a complaint to the court upon oath, that the prisoner goes at large, to make an order that he shall be closely confined, and actually remain in custody, within the walls of the prison; and many a man hath been helped to his debt, by this single proceeding.

So it is where a man hath a bill depending in court, and falls under the displeasure of the court, and is ordered to stand committed. Here, when his cause is called, if the other side insist he hath not cleared his contempt, nor actually surrendered his body to the warden of the *Fleet*; he must do both these things before his cause can be proceeded in, and it must be struck out of the paper, and he must get it restored into the paper again as well as he can, but not till he hath actually surrendered himself, paid the costs of the contempt, and obtained an order for his being discharged out of custody.

So it is when a man is ordered to stand committed, he shall not move to discharge or shew cause against the order, till he is in custody, unless he hath leave by petition, grounded upon very good and strong reasons for his doing so,

so, he must answer * *in vinculis*; and the court often says, where is your client, we want to speak with him, let him be in custody, and then we will talk to him, but before he is in custody, he is in no case admitted to shew cause, but by special leave of the court.

Lastly, it were to be wished, that the number of solicitors in the court of chancery was regulated and reduced, and that none should be admitted to practice, but such as have served their time with a known and able practitioner, who will certify for their due qualifications, and that none should be admitted to practice, but who are approved of by the Lord Chancellor or Master of the Rolls for the time being (as at law). This would prevent multitudes of most frivolous and vexatious suits; it would at once break the neck of *Fleet* and *Wapping* solicitors; it would take off that † *odium*, that every broken tradesman turns solicitor; it would bring the business into few hands, and none would practice but men of skill, who have had a regular education in their profession, and they would be such persons as are of known characters, and good reputation in the world; the suitors of the court would find their account in it; all the gentlemen of *England* would be encouraged to breed up their sons this way; and this matter hath been often considered, but as every man may follow and solicit his own cause if he pleases, so it hath been thought that the court cannot by virtue of their own authority make such an ordinance; but it is believed if such a clause

See 2 Geo.

2. c. 23.

An act for the better regulation of attornies and solicitors.

* In custody. † Reflection.

were offered to be added to any act of parliament, as was once thought of, it would meet with little opposition if any at all.

C H A P. XII.

Some general observations on the court of chancery.

AND first concerning the bill * *ad sectam*.

Clerks Praxis
35.

And this answers to the libel in the canon law, as the subpœna does to the citation; and as the citation in the canon law, does not specify the particular and distinct cause of action, so neither does the subpœna in equity; and therefore any equitable bill may be founded on the same subpœna, as any libel might on the citation; or (which is much stronger) two distinct bills might be grounded on the same subpœna, between the same parties, for different causes; and in the bill, the fact must be set out as it is, with all equitable circumstances, and proper interrogatories formed and put to the conscience of the defendant upon the fact and circumstances.

Two distinct bills may be grounded on the subpœna, between the same parties.

No interrogatories but such as arise from a fact in the body of the bill.

But no interrogatories can be put that do not arise from some fact charged in the body of the bill, or, if such interrogatories be put, the defendant may either demur to such interrogatories as having no foundation in the

* At the suit of a person.

bill, or may omit to answer them; and if there be exceptions for want of an answer to such interrogatories, the exceptions on a reference will be over-ruled with costs.

Care must be taken in the bill, that the plaintiff of his own shewing, hath not a remedy at law, for that will be good cause of demurrer. And for this reason, as it is said, there must be an affidavit to the bill, where relief is demanded. But fraud is properly conusable in a court of equity, because it lies in the dark, and is discoverable principally from the oath of the defendant himself, and therefore, tho' an action on the case lay upon the fraud, yet it is proper for a bill in equity.

Affidavit where relief demanded necessary.

And it is a general rule, that where-
ever the matter of a bill is merely in damages, there the remedy is at law, because the damages cannot be ascertained by the conscience of the Chancellor, and therefore must be settled by a jury at law; and therefore the chancery never tries the * *quantum* of the damages in a † *quantum damnificatus*, where you demur to the bill, unless there be matter of fraud mixed with the damages. As if *A.* brings an action of covenant at law for damages, and *B.* files a bill for an injunction, upon this equitable suggestion, that the covenant was obtained by fraud: if *A.* files his cross bill for relief upon that covenant, the court will retain it, because the validity of the deed is brought in question in that court, and on a head properly conusable there; and there-

Where the matter of a bill is merely in damages, the remedy is at law; but if fraud be mixed with them, the chancellor will retain the bill till the damages are ascertained by a jury.

* Quantity. † What damages.

fore if the validity of the deed be established, the court will direct an issue for the * *quantum* of the damages.

But a man comes properly into a court of equity, for the specific performance of a covenant, because a man is in conscience obliged to perform his own contract in specie, and therefore the relief at law which gives only damages for the breach or non-performance, is inadequate, and consequently the plaintiff is proper in equity, for that specific performance, which he cannot obtain at law, and therefore the court retains such bills.

What is to be done when there is the same relief in law as in equity.

But here a distinction is to be observed, that where the common law would give the same relief as a court of equity, there, if the defendant would deny the deed, and demur to the relief, the demurrer will be allowed; as if the covenant were to pay a certain sum, and the deed be denied, the defendant hath a right to try it by a jury, and there being the same relief at law in this case as in equity, to avoid circuitry the cause ought to be dismissed and left at law, and the rather, because equity doth not relieve where the plaintiff hath the same relief at law.

But if the defendant doth not demur to the relief, but answers, and the deed denied by the answer, is proved in the cause by two witnesses, the court will decree for the plaintiff on the hearing; but if it be proved only by one witness, there the court grants a leading order to try it at law, and then the parties come back upon the equity reserved, because

* Quantity.

the defendant admitted the jurisdiction, by answering and putting it in issue, and not demurring thereunto.

But where the covenant is not for the payment of money, but for the doing a thing in specie, as conveying lands or executing deeds, there tho' the defendant denies the deed, yet he cannot demur to the relief, because the plaintiff seeks a different relief, and is intitled to other relief if the deed be good, than what the law can give him; and therefore the defendant's suit is well instituted in the court of equity, since he must come back for that relief to equity after the deed is established by law.

Secondly, where conveyances are defective, In what cases if they be upon valuable consideration, a court the heir and of equity will oblige the vendor or mortgagor heir in tail to make good the defect, because it is according to conscience, that he should make good shall make good a defective conveyance. his own agreement or contract; and this as well where there are covenants for further assurance, as where there are not. But where there is a defective conveyance without an equitable consideration, a court of equity will not oblige him to make it good, tho' there be a covenant for further assurance; as if a man makes a voluntary feoffment to a stranger without livery, the feoffor or his heir shall not be obliged to make good that defect, but it shall be construed in equity to be an estate at will, as it is in law.

But if a man conveys to a younger son by a defective conveyance, a court of equity will oblige the father and the heir to make it good. The father shall make it good whether there
be

be a covenant for further assurance or not, because the conveyance shall be intended a provision for the son, which is a good consideration, the father being obliged to provide for him by the law of nature. The heir shall likewise make it good in these two cases: First, where there is a covenant for further assurance binding the heir, because the heir is bound by the covenant: and secondly, where there is a provision made by the father in his life time for the heir, or where he hath such a provision by descent from the father, there the heir shall make it good without a covenant for further assurance; because the intention of the father to provide for his younger son, is just and equitable, and therefore the heir shall fulfil it.

But where the father conveys to the son by a legal conveyance, and afterwards sells to a stranger for valuable consideration, but by a defective conveyance or by articles agrees to sell, the son shall be obliged to supply the defect in the second conveyance, or to execute a deed pursuant to the articles, because the purchaser for valuable consideration is to be preferred in equity, before the provision for the son; and the provision for the son is esteemed fraudulent in equity, where the father afterwards conveys for valuable consideration. *Leach v. Dean, Ch. Rep. 146.*

But if a man makes a conveyance to a son, and the son sells for valuable consideration, and after the father sells for valuable consideration, the purchaser from the son shall prevail, because he had purchased for consideration, without notice of the father's intention
to

to sell afterwards for value; and therefore as he comes in with a good conscience, and for value, he shall hold against the purchaser of the father.

But if the purchaser from the son comes in by a defective conveyance, and the purchaser from the father comes in by sufficient conveyance without notice of the sale by the son, he shall hold it against the vendee of the son, because both are equal in equity, and then he who has the legal estate of course prevails.

If a tenant in tail, makes a conveyance for valuable consideration, without fine or recovery, and dies before the fine or recovery is levied or suffered, a court of equity will not oblige the issue in tail to make good that conveyance by docking the intail, because the court of equity cannot set aside the statute * *de donis*, which says that, † *voluntas donatoris observetur*; nor would the court set up a new maker of conveyances of intail; other than by fine and recovery. But if the issue in tail receives part of the purchase money in his father's life time, or after his death, or if he had joined in the deed with his father, or covenanted for further assurance, a court of equity would oblige him to make it effectual by fine and recovery.

But if tenant in tail covenants for valuable considerations to levy a fine, and is decreed to do so by a court of equity, but dies before the fine is levied, his issue is bound by the decree, and shall be compelled to levy the fine. And the reason is, because the court

* Of gifts.

† The donor's will shall be observed.

of equity would have decreed, that whenever the master of the estate receives money, his heirs should have conveyed, if that would not have introduced a new manner of conveying of estates tail. For a court of equity would not have distinguished whether the conveyance was by fine or recovery, when price was paid, or by deed under hand and seal only; [For livery was as essential to pass a fee at common law, as the recovery was to pass the tail, and yet the court of equity dispensed with the ceremony of livery where price was paid for the intail.] if it had not been for this inconvenience, that it would have introduced a new manner of conveyancing of intails. And as copy-holds were conveyed by surrender, so intails were conveyed by fine and recovery, and they have never changed the methods or instruments of conveyancing of these estates. And it would have altered the very method of conveying the intail, if the heir should be bound specifically to perform the covenant: because no purchaser would have troubled himself with a fine or recovery, if when the issue in tail had molested him, he might have resorted to equity, and had an injunction or other relief there; and the King would have lost a great perquisite by the fines on the writs of entry, and in fines for alienation, if any other method of conveying estates tail had been established. But none of these inconveniencies will ensue, where they institute a suit in the life time of the tenant in tail, and obtain a decree against him to levy a fine and suffer a recovery. For there it appears that the purchaser doth not trust to any other conveyance than

than a fine or recovery from tenant in tail; when he comes in his life time to oblige him to execute them. And the original equity of the purchaser is not altered by the accident of the death of tenant in tail, but the issue shall be bound to make it good according to the maxim, * *qui decretum habet ad rem recuperandum, ipsam rem videtur habere.*

Decius Reg.
Juris 93, 94;

And it seems that the heir in tail, tho' not heir to the covenant, and the remainder man also will be bound by the decree against the then tenant in tail, because it is a decree † *in rem*, and not merely § *in personam*; and therefore whoever comes after the person who sold, and who at the time of the sale had the entire dominion over the land, shall be bound by the decree that affects the land itself. But *quare.*

But it was settled in the case of *Sangon and Williams*, adjudged the fifth of February 12th of Queen Anne, that where tenant in tail for valuable consideration mortgages his estate without levying a fine, or suffering a recovery, and a bill is exhibited against tenant in tail to dock the intail, and decreed accordingly; upon which tenant in tail is taken up, and dies in prison, and afterwards a bill is preferred against the heir in tail to execute that decree upon him; but the plaintiff's bill was dismissed, both by the master of the Rolls, and upon a re-hearing, by the Lord Chancellor, because the statute || *de donis conditionalibus*, His case is cited in Coventry v. Coventry, Gilb. Eq. Rep. 164.

without levying a fine, or suffering a recovery, and a bill is exhibited against tenant in tail to dock the intail, and decreed accordingly; upon which tenant in tail is taken up, and dies in prison, and afterwards a bill is preferred against the heir in tail to execute that decree upon him; but the plaintiff's bill was dismissed, both by the master of the Rolls, and upon a re-hearing, by the Lord Chancellor, because the statute || *de donis conditionalibus*, Statute de donis binds a court of equity.

* He who hath a decree for the recovery of an estate, is looked upon to be in possession of the estate.

† Against the estate. § Against the person.

|| Of conditional gifts, or gifts in tail.

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binds

Gilb. Eq. Rep.
160.

binds the court of equity, so that they cannot decree **in rem*, contrary to the statute, since the court of equity is bound by the statute, as well as a court of law; and therefore they could only decree against the tenant himself, and not against the heir; for though a tenant in tail may creep out of the statute by a recovery, yet there the statute is legally avoided, by a title paramount; and this fictitious title is allowed to prevent perpetuities; but where the estate tail is not legally avoided, the court of equity will not pretend to set aside the operation of the statute, by their decree; and this was allowed to be the true doctrine in the case of *Coventry and Coventry*.

But there is no doubt that if a tenant in tail of a copy-hold should sell his copy-hold for money, and die before the surrender, a court of equity will decree the heir in tail should convey, because the intail of a copy-hold is at common law, and not within the statute † *de donis*, and therefore the want of a surrender will here be supplied as well as livery.

But if there be tenant in tail in equity, as of a trust, or under an equitable agreement, and such tenant in tail bargains and sells the land for money, without fine or recovery, this shall bind his issue, because the statute † *de donis* doth not extend to it, being an intail in equity, and this being a creature of the court, the person that is master of it, shall in equity bind any person deriving under him. *Norcliffe v. Worsell*, Nels. Ch. Rep. Temp. Finch 128. Ch. Cas. 234. 3 Ch. Rep. 29. *North v. Champer-*

* Against the estate. † Of gifts.

noon, *Eq. Abr.* 256. p. 3. 258. *D. p.* 1. 2 *Ch. Caf.* 63; 78. *Vern.* 13. *Sayle v. Freeland, Eq. Abr.* 345. p. 15. 2 *Vent.* 350. See also the case of *Coventry and Coventry, Gilb. Eq. Rep.* 160. this distinction affirmed.

But if tenant in tail of a trust in equity comes to the court for a specific execution of the trust, and desires that it may be executed to him in fee; though he be master of the estate, yet the court will not decree it to him in fee, because that would be an injury to the remainder man, insomuch as there is a hazard that the tenant in tail may die before the intail be docked by the recovery. And so it is if money be devised to be laid out in land, and to be settled in tail with a remainder over, if the tenant in tail applies to equity for the money, he cannot have it without the consent of the remainder man, because the money is considered in equity as land; and as equity cannot bar the remainder, upon an intail of lands without a recovery, so neither can they decree the absolute property of money, without the remainder man's consent: and if he doth not consent, you take away the hazard he has of obtaining the money in case the tenant in tail should die before the purchase made, or after the purchase made, and before the recovery suffered.

Chan. Cal.
234.
2 Chan. Caf.
64.
2 Vent. 350.

And here by the way we may take notice that it hath been the opinion of equity men, that if tenant in tail of a trust contract debts that will affect lands, as if he mortgages the trust estate, or confesses judgment and dies * *post prolem suscitata*: that the court will decree If tenant in tail of a trust estate contracts debts by mortgage or judgment after issue born, it binds the issue and remainder man.

* After issue born.

cree such debts to be paid out of the trust estate in favour of creditors, against the issue in tail, or the remainder man; because they construe their own creature as a fee simple conditional before the statute * *de donis*, which became absolute by the having issue, and the donee thereby had the power of alienation over it.

Having thus said how far the tenant and heir and heir in tail shall make good a defective conveyance, the next thing to be considered is how far the assignee of the person making such defective conveyance should be obliged to make them good.

And here in the first place, if a man makes a defective conveyance as a mortgage by feoffment without livery, and after should convey to a purchaser for valuable consideration by an effectual conveyance without notice, the second shall undoubtedly prevail: because he hath both law and equity, and there the title at law must prevail, there being no equity to set it aside.

The original security of a bond is only against the person, but after judgment it is against the estate.

But where *A.* takes a mortgage by a defective conveyance, as by a feoffment without livery, and the mortgagor borrows money of *B.* upon bond only, and *B.* afterwards obtains judgment against the mortgagor, and so extends the mortgaged lands, there a court of equity will relieve *A.* and oblige *B.* to supply the defect of livery in the mortgage. For in this case *B.* was only a bond creditor, and his original security was only † *in personam*, and therefore when he betters his security by a

* Of gifts. † Against the person.

judgment * *in rem*, yet this shall be only a *lien* on the land, as it was in possession of the mortgagor or his heir; and that is subsequent to a mortgage defective at law, but which was good in equity. And they keep them bound in a court of equity to make good the defective conveyance. And there is a manifest difference between this and the common case where a man mortgages land to *A.* and afterwards to *B.* and afterwards to *C.* without notice; there *C.* having honestly taken the land as his pledge, has a title to the land itself, and therefore he might take in the title of *A.* to strengthen and corroborate his own; tho' by that means he crowds out *B.* for he that hath an honest title to the land, may take in a precedent title to secure his own, but he that has no title to lands, as the bond creditor had not, cannot subsequently secure that money by judgment, so as to crowd out a person that had a title to the land itself. For the forming a legal title to the land by the judgment on the bond, which was originally a personal security, is grasping at land, which then in a court of equity belonged to another, and therefore he must enjoy them subject to the equity. For the court of equity will not suffer the person that originally lent upon the security of land, to have the security destroyed by one that did not lend upon that security, since a court of equity would not let a subsequent lender on the land, with notice, destroy or take place of such defective convey-

* Against the estate.

ance; and if such defective mortgagee had the deeds, the second lender, must necessarily have notice, since without the deeds, a title could not be made out to the second lender. And the bond creditor coming in on the personal security, to whom no notice could be given, and whose personal security did not, in its own nature, require a sight of the deeds, ought not therefore to be in a better condition than a second mortgagee, coming in with notice. And if this should be allowed in a court of equity, if there were a defective mortgagee, or purchaser, tho' always in possession of the lands, yet if the vendor had any debts, by bond, or simple contract, prior in time to such purchase or mortgage, he might by confessing judgment to such creditor, subsequent to such purchase or mortgage, avoid, or postpone his own mortgage or sale. For these reasons equity hath obliged the bond creditor who obtained judgment and extended the mortgaged land, to supply the defect in the mortgage or purchase, and gives injunctions to put the mortgagee or purchaser into the possession of the land.

But if *A.* makes a defective mortgage to *B.* and *A.* continues in possession, and afterwards gives a bond to *C.* with warrant of attorney, to confess judgment, and *C.* enters judgment immediately; there it should seem that the bond, warrant, and judgment, are to be looked upon as one act, and that *C.* had the land originally in view for his security; and there *B.* cannot have relief against *C.* upon the defective conveyance, in a court of equity.

Where

Where an agreement relating to lands, is ² Ch. Caf. not reduced into writing, according to the ^{135, 136.} statute of frauds and perjuries, the court of equity cannot relieve or compel the performance of that agreement, because the statute was made on purpose to prevent those agreements being carried into execution, where there was no writing. Yet if an agreement be made, tho' not in writing, and the party by whom it was made, receives all, or part of the money, equity will compel a specific performance of the whole agreement; because this is out of the statute, which designed to defeat such agreements only, no part whereof was carried into execution, and set up merely by parol. For that was the occasion of fraud and perjury, that persons used to swear verbal agreements upon others, and by such false oaths charge the parties in equity to perform suit, tho' the agreements had never been made; and therefore the mere parol proof of such agreement, concerning lands, cannot be admitted in a court of equity. But where the price is paid, there it doth not stand upon the parol proof of the agreement only; but upon the execution of part of the agreement, which is the evidence that the agreement was really made; and therefore there is the same reason that the plaintiff in equity should have the land for his money, as there is, that every person should deliver the goods where he hath received the money for them.

A parol agreement, if partly executed, not within the statute of frauds.

No parol proof of an agreement concerning land not reduced into writing, to be admitted.

But here it may be doubtful in some cases, what shall be a proof of the receipt of the money by the defendant. Thus far seems

What is a proof of the receipt of money.

Q 4

certain, ² Chan. Caf. 36.

certain, that if the defendant in his answer, confesses the receipt of the money for the purpose in the bill, or if he denies the money, and it be proved upon him by writing, as by letter under his hand, or other written evidence, he shall be obliged specifically to perform the whole agreement, because he hath carried part into execution.

But if the defendant confesses the receipt of the money, but says that he borrowed it from the plaintiff, and that he did not receive it in execution of that agreement, there he turns the proof of the agreement upon the plaintiff, and then it should seem that the plaintiff should prove by some written evidence the receipt of the money by the defendant for the purpose in the bill, or prove the agreement itself by some writing. But if the plaintiff can only prove the agreement for the sale, or the receipt of the money in execution of the agreement, merely by parol evidence, this will not be sufficient to set up such agreement by the statute, because such parol evidence is excluded by the statute; because the parol is not applied to the bargain, but to the act of receiving the money, which if proved to be received as pursuant to the bargain; then the act of receiving is a further evidence of the bargain than the parol proof of such bargain only, and the proof of the agreement stands upon the act of receiving.

a Vent. 361. But if *A.* buys lands with the money of *B.* there is a resulting trust to *B.* arising by operation of law, which the statute doth not extend

extend to, and if the defendant confesses the receipt of the money for that purpose, or if the plaintiff can prove it by parol evidence, it is sufficient; for the application of money under a trust makes the lands purchased by the money subject to the trust, and so excepted by the statute.

But more of this in the *Lex Prætoria* under their proper heads.

Lex

Lex Prætoria.

THE *Lex Prætoria* contains the rules that govern in a court of equity. How this court began and was established is already considered in the *Forum Romanum*: what are the proper heads of relief remain to be treated of, and they may be reduced to these:

- 1st, Specific performances of agreements.
 - 2^{dly}, Portions.
 - 3^{dly}, Frauds.
 - 4^{thly}, Powers.
 - 5^{thly}, Wills, executors, administrators, devises and legacies.
- } These are treated of together.

First, of specific performances of agreements.

AT the common law every covenant and agreement was but personal, where there was no proper conveyance to transfer the right of the thing itself, and being only a personal covenant, when it was broken, the covenantee could only recover damages. Thus if a man covenanted to settle his lands upon marriage, or to convey them for valuable consideration, the covenantee could only recover damages at law for the breach of such covenant, but had no remedy for the settlement of the thing

thing itself. This was thought incompetent, because the party who had entered into the covenant, was obliged in conscience not only to make compensation for the breach where he could not perform, but also actually to perform where it was in his power so to do; and therefore the court of equity deals with the corrupt conscience of the party where he refuses to perform what is in his power. And since a court of equity, where a man bargains to do a thing, in conscience and justice looks upon it as a thing already done and performed, therefore their decree is not only **in personam* but †*in rem*, and binds the right of the thing itself; so that all persons coming in §*pendente lite*, or after a decree, are bound by it; and if it were not so, the remedy of a court of equity would go but little further than that of a court of law, for that is **in personam*: therefore to make the remedy adequate to the mischief, the court of equity does that which a man in honesty and conscience ought to do; that is, settles the estate itself in pursuance of the covenant.

If a man is divorced from his wife for adultery and marries another, and enters into an agreement upon such marriage, a court of equity will specifically perform it, because it is a marriage according to the christian law; and therefore such agreements as are made upon such marriage ought to be established ||*in foro conscientiae*. For tho' such marriage be a nullity by the common law, upon political

* Against the person.

† Against the estate.

§ Pending the suit.

|| In a court of conscience.

reasons,

reasons, lest marriages should be dissolved by frequent adulteries, yet since they are not against the law of God, such agreements upon such marriages are not contrary to natural justice, nor * *mala in se*, and therefore they ought to be established in a court of conscience; and there is a meritorious cause in this agreement, since the woman gives up her person to the man, and likewise her fortune.

If an agreement be made before marriage by way of articles, and afterwards be formally drawn up before marriage by way of settlement, and any thing in the original agreement be omitted, it is presumed † *prima facie* to be waved, unless it can be proved to be left out or omitted by fraud or mistake; but if articles be made before marriage, and the marriage takes effect, and afterwards a settlement be made and any thing be omitted, there it cannot be presumed to be waved, because that cannot be after marriage.

If a man by his answer owns to have made a compleat agreement, tho' such agreement be not in writing, yet the court of equity will carry it into execution. For the (a) statute of frauds and perjuries was designed to hinder fraudulent and surreptitious agreements, and not to vacate bargains that were fairly and honestly made. For in these cases the party is bound in a court of conscience not to take advantage of the want of any solemnities, whether imposed by common or statute law. But if the defendant insists in his answer, either that the bargain was fraudulent or not compleat, but

Croyston v.
Banes, Ch. Pre.
208.

Eq. Abr. 19.

p. 3.

2 Eq. Abr. 47.

p. 15. in margin.

(a) 29 Car. 2.

c. 3.

* Evils of themselves.

† At first.

merely

Bawds v.

Amhuft.

Eq. Abr. 20.

p. 6. 21. p. 8.

Pre. Ch. 402.

2 Ch. Rep.

284.

merely a communication for the terms to be further settled, there he may plead the statute, and it shall be allowed. For in the first case where he acknowledges the bargain to be compleat and not fraudulent, he ought to wave the benefit of the statute, for no honest man should insist on the want of solemnities where he has made a fair bargain. But where he insists either that the bargain is not made or fraudulently made, there he may insist on the statute. For where the plaintiff in equity does not take security in the legal solemnities of contracting, he is at the mercy of the defendant's oath. Only there is this difference, that if the defendant denies the bargain, then the plea must be allowed, for the plaintiff can prove nothing but a written bargain, and that appears by his bill he cannot do; but if the defendant allows the bargain to be compleat, but fraudulent, there the benefit of the plea is to be reserved to the hearing, because the fraud is still * *sub judice* and in issue; but if he allowed the bargain to be compleat, and does not insist on any fraud, then there can be no danger of perjury, because he himself in his answer has owned the agreement, and taken away any necessity of proving it. *Limondson v. Sweed*, *Gilb. Eq. Rep.* 35. *Pre. Ch.* 208, 374. *Eq. Abr.* 19. p. 3. *Vern.* 151, 159. 2 *Vern.* 373.

Seagood v.

Meale, Pre.

Ch. 560.

2 Eq. Abr. 49.

p. 20.

If an agreement be by parol and not signed by the parties, or some one lawfully authorized by them, if such agreement be not confessed, as is said, in the answer, it cannot be

* In contest.

carried

carried into execution, but if it be carried into execution by one of the parties, and such execution be accepted of by the other, he who accepts it must perform his part. As if *A.* sells his estate to *B.* by parol for one thousand pounds, if *A.* accepts the one thousand pounds, or any considerable part of it, he must convey his estate to *B.* for otherwise it is a fraud to accept the money of *B.* and not convey it. And it could never be the intent of the statute, (which was to hinder bargains from being sworn upon men that they never made) that men should take advantage of not compleating bargains which they had made, and which were actually performed to them; for when there is a performance, the evidence of the bargain does not merely lye upon the words, but upon the fact performed, of which they have reaped the advantage: and it is perfectly unconscionable that the party who has received the advantage of the verbal contract should be admitted to say such contract was never made; for the law must be construed according to natural equity, and not to create a fraud, and the person that receives money and does not convey, is plainly guilty of a fraud, and therefore must not be permitted to insist that he did not sign, when he has received all the benefit he could have had by such signing, for that were to construe the statute against frauds, so as to protect fraud and not suppress it. *Leake v. Maurice, Eq. Abr. 23. p. 20. 2 Ch. Cas. 135.*

A. sells houses to *B.* for two thousand pounds, and *A.* draws up a note of the agreement in

writing, which *B.* signs, but *A.* does not. *A.* brings his bill against *B.* to compel him to a specific execution of this agreement; and it was decreed for *A.* for his drawing up a note of the agreement in his own hand, and procuring *B.* to sign it on his part, that the signing of *B.* is not only a signing for himself, but as authorized by *A.* to close the agreement. And therefore if *B.* had come into a court of equity against *A.* the court would have decreed the agreement against *A.* and therefore * *vice versa.* *Hatton v. Gray, Eq. Abr. 21. p. 10. 2 Chan. Cas. 164.* But here it is to be noted that the plaintiff, that exhibited his bill upon the foot of performing the bargain on his part, ought to shew that he has performed all that is to be done on his part, or is ready to do it; for where any part (which he should have performed) is become impossible to be performed at the time of exhibiting his bill, there he can have no specific execution, because he cannot specifically execute on his own part: As in the case of my Lord *Feversham*, which was on a marriage agreement, whereby he contracted to settle the manor of *Holmby* on his wife, and the heirs of their bodies, and clear it of incumbrances, and settle a separate maintenance on his wife, and likewise sell some pensions in order to make a further provision for his wife, and the issue of that marriage; and Sir *George Sandys*, the father-in-law, agreed to settle three thousand pounds *per annum* on the Lord *Feversham* for life, remainder to the wife for life, and so to the issue of that marriage. Lord
Feversham

* Contrariwise.

Feverſham cleared the manor of *Holmby*, ſettled it accordingly, and ſettled the ſeparate maintenance, but did not ſell the penſions, nor ſettle the farther proviſions; the wife died without iſſue, and the Lord *Feverſham* preferred his bill, to have the three thouſand pounds *per annum* ſettled on him during his life; but denied, becauſe Lord *Feverſham* was * *in ſtatu quo*, as to all that part of the agreement which he had performed, and having not performed the whole, and the other part being now impoſſible, and no compensation being poſſible to be adjusted for it, he had no title in equity to have performance of Sir *George's* part of the agreement, ſince ſuch performance could not be mutual: But the iſſue of Lord *Feverſham* might have been relieved becauſe in no default. Lord *Feverſham v. Watſon*.

Rep. Temp.
Finch 445.
2 Freem. 35.
Skin. 287.

But if a man has performed ſo much of his part of the agreement, as he is not * *in ſtatu quo*, and is in no default for not performing the reſidue, there he ſhall have a ſpecific execution from the other party of the agreement; as if a man has contracted for a portion with the wife, and has agreed to ſettle upon the wife and her iſſue, lands of ſuch a value free from incumbrances, and he ſells part of his land to diſincumber, and is going on to diſincumber and ſettle the reſt; there if the wife dies without iſſue before the ſettlement be actually made, yet he ſhall have the portion, becauſe he cannot be * *in ſtatu quo*, having ſold part of his lands, and there was no default in him ſince he was going on to

* In the ſame condition.

disincumber and settle the rest, therefore the accident of the death of his wife doth not alter his right to his wife's portion. *Meredith v. Wynne, Eq. Abr. 70. p. 15. Gilb. Eq. Rep. 70. Pre. Ch. 312. 2 Vern. 448.*

If *A.* covenants and agrees with *B.* to sell him his land for one thousand pounds, and there be no covenant in the articles on the part of *B.* to pay the money, and *B.* does not sign it, *B.* can never exhibit his bill for a specific performance, because he is not bound; but if *B.* had signed the articles, then there must be a covenant tendered to *B.* to seal for payment of the money, or there must be a conveyance tendered by *A.* which he is ready to seal upon payment of the money; and if in the first case he refuses the covenant, or in the last to pay the money, *A.* is fairly off the bargain and may sell to another, because the estate is not to be perpetually under the obligation of that contract which *B.* has refused to compleat. But if a third person should take a conveyance with notice of the articles, and without such tender and refusal, he would be liable. But if *B.* had never signed, then a third person might safely take it, for *B.* not having signed is under no obligation, and the obligation not being reciprocal, it is a catching bargain; and *B.* cannot come into a court of equity for a specific performance, but is left merely to a court of law upon his action of covenant.

Fraudulent agreement.

If the agreement be unreasonable, or obtained by fraud or circumvention, a court of equity will not carry it into execution, because that were to establish the fraud. *Young v. Clarke, Pre. Ch.*

Ch. 538. 2 *Eq. Abr.* 18. *p.* 9. 2 *Mod. Cas.* 152. and if they should proceed to recover damages at law the court of equity would interpose, *Hicks v. Phillips*, *Pre. Ch.* 575. 2 *Eq. Abr.* 18. *p.* 10. 688. *p.* 6. But on a bill brought by a natural daughter to have a defective conveyance supplied, the court declared shew as a volunteer, and would not compel the heir to supply the defect. *Seagood v. Meale*, *Pre. Ch.* 560. 2 *Eq. Abr.* 49. *p.* 20. So likewise the bargain ought to be reduced to certainty; for if a man in consideration of marriage promises by his letter to pay his daughter a fortune, without reducing it to any certainty, a court of equity cannot carry it into specific execution, because nothing is promised. *Hall v. Butler*, *Eq. Abr.* 20. *p.* 7.

If a man by articles agrees to sell his estate, and part of the money is paid, and then he dies before the conveyances are perfected, the executor of the vendor prefers his bill against the purchaser, and likewise against the heir of the vendor to have the conveyance completed, and the residue of the purchase-money paid to him, the purchaser is willing to be off his bargain and lose the money already paid, and the heir likewise desires that the bargain may not proceed, yet the court of equity decreed it, because from the time of the bargain the land of the vendor is to be looked on in a court of equity as money, and to belong to his executor, for the vendor by his bargain has turned his land into money.

If on any treaty the agreement is not reduced into writing, or proposed to be reduced into writing, or executed in part, there

the statute of frauds is in the way; but if the agreement was proposed to be reduced into writing, and prevented by fraud or practice, the court of equity will interpose, and give relief. *Maxwell v. Mountacute, Eq. Abr.* 19. p. 4. 20. p. 5. *Pre. Ch.* 526. *Wms. Rep.* 618.

If there be a woman's portion to be settled on the husband and wife, and the heirs of their two bodies, with a remainder over to the right heirs of the husband, and the husband dies leaving issue, and afterwards the issue dies, the heir of the husband in remainder may come to have an execution of this agreement, and it shall be executed, and the money laid out in lands, of which the wife shall be only tenant for life. *Whitwick v. Germin, 2 Vern.* 58.

If a man grants a rent-charge out of a bishop's lease and settles it by way of demise and re-demise, so that it is redemised subject to the rent-charge, if the grantor agrees for the renewal of the bishop's lease, a court of equity will compel the grantee to join, the grantor conveying the additional lives in the same manner to the grantee, for the security of the rent-charge. And it was the opinion of the court likewise, that the grantee might compel the grantor to renew in case of failure of lives or effluxion of years, for the grantee of the annuity might have a writ of annuity, and thereby continue the payment during his life, if he had not resorted to the lands, and therefore when he does resort to the lands he shall have all remedy to make them a security to him during his life, in all events, if it may be obtained. But if the bishop refuses to renew, the court cannot compel him. And

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quære whether the court will compel if the bishop refuses on the common terms. For if the bishop refuses to renew on the common terms, it is tantamount to an absolute refusal, and the grantee must be contented with the security of the lives in being.

If a man agrees by articles under his hand to convey his wife's lands to *B.* *B.* may pre-fer his bill against the husband and wife to compel a specific execution of this agreement; and if the wife upon private examination consents, the court will decree it. But *quære*, whether the court will decree it if the bill be preferred against the husband only; because if the court should compel the husband, the husband would compel the wife who is under his power, and the wife ought not by law to convey by means of any compulsion from her husband. *Wheeler v. Newton*, 2 *Eq. Abr.* 44. *p.* 5. *Pre. Ch.* 16.

A scrivener lays out the money of *A.* on the lands of *B.* upon which *B.*'s wife is jointured. The counsel of *A.* gives notice to the scrivener of this jointure, and that it should be transferred on other lands, but the scrivener conceals this from *A.* and tells him he may trust *B.* as a very honest man. Whereupon *A.* lends his money, and afterwards, upon the death of *B.* the jointure appears which the scrivener had purchased in; whereupon the scrivener to silence the clamour of *A.* signs and seals an agreement to assign such jointure to him, and then being unwilling to abide by his agreement, files his bill to have up his agreement, and *A.* files his bill for the specific execution of it. The scrivener's bill was dismissed, and *A.* was decreed to a specific per-

formance. For tho' the scrivener insisted that he had no consideration for assigning his interest, yet since *A.* had a loss by his means, to wit, by his fraud in concealing the jointure from *A.* and afterwards purchasing it in, which fraud he had agreed to compensate by articles, he ought in good conscience to make good this agreement. *King v. Withers, Pre. Ch. 19.*

There is a marriage agreement in which the father of the wife agrees to pay one thousand five hundred pounds for the wife's portion, and the husband agrees to add one thousand five hundred pounds more to it, and that both sums should be laid out in lands to the use of the husband for life, remainder to the wife for life, remainder to the issue of that marriage, remainder to the right heirs of the husband, the husband dies without issue, the wife's portion remains in the hands of the father-in-law, and the husband makes his right heir his executor, who exhibits his bill against the father-in-law and the wife, and obtained a decree to have the portion secured and paid to him after the death of the wife, and was decreed to pay the interest of the one thousand five hundred pounds, which the husband was to add as a provision unto the wife during her life. *Knight v. Atkins, Eq. Abr. 274. p. 6. Vern. 20. 2 Ch. Rep. 400.*

But if the husband settles lands upon the marriage of his wife, and agrees to purchase other lands of one hundred pounds *per annum* to make an addition to the wife's jointure, which is to be settled on the wife for life, remainder to the right heirs of the husband. The husband dies, the wife takes out administration

nistration to him, and the heir of the husband exhibits his bill against the wife to have so much of the personal estate laid out as would purchase land of that value to be settled on the wife for life, remainder to him in fee. But the bill was dismissed, because this was a covenant only made for the benefit of the wife, which he could relinquish and discharge at pleasure, and therefore the heir of the husband could never take advantage of it, to wrest the money out of the hands of the wife as administratrix, to be settled for his benefit; and this is different from the former case, for there the heir and executrix of the husband comes for the wife's portion to which he was well intitled, it being an interest vested in the husband; but in this case the heir of the husband comes against the administratrix of the husband for the benefit of a covenant which was never intended for his benefit, but for his wife's, which she may relinquish or chuse whether it shall ever be performed: and it could never be the intention of this agreement to take the money from the representative * *quoad* the personal estate, and give it to the representative * *quoad* the real. *Laughton v. North, Eq. Abr. 274. p. 9. 2 Ch. Cas. 156. 2 Ch. Rep. 271.*

If there be an agreement upon marriage, that the money of the wife should be left in the hands of trustees, and the husband to have the interest of it during his life, and the wife during her life, and then to the issue of that marriage, remainder to the heirs of the body of the wife, remainder to the wife's bro-

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ther and his heirs, if the wife dies without issue; in case of such express covenant the brother shall be decreed to have the portion secured to him after the death of the husband; but if the proviso of the deed had been so penned as to leave it to the election of the husband and wife after marriage, to have the portion laid out to the uses aforesaid, there the brother could not have a decree for the money after the death of the husband, because the money of the wife belongs to the husband upon the intermarriage, which the brother could not claim when it was still to be in the election of the husband, whether he would vest it in lands or not. *Simonds v. Rutter, Eq. Abr. 274. p. 7. 2 Vern. 227. Pre. Ch. 23.*

If the husband after marriage, without previous articles, makes a provision or settles a jointure on his wife, this is no more than a voluntary conveyance, and will not (therefore) be helped in equity, even against the heir at law, or any other volunteer. *Fothergil v. Fothergil, Eq. Abr. 222. p. 9. 2 Freem. 256.*

If a man has a bad title at law, he cannot by fraud procure the person who has the good title, to convey, for such fraudulent conveyance is as if there was none at all, and so will be set aside in a court of equity, tho' formerly there have been decrees, in which such fraudulent agreements have been established upon the merits of the former title. *Frank v. Frank, Ch. Cas. 84. Eq. Abr. 24. p. 4.* But now a man who comes in upon valuable consideration, cannot strengthen his title by purchasing in the title of a stranger by fraud.

If

If *A.* tenant in tail agrees with *B.* tenant in fee, to exchange their lands, and they mutually enter into each other's lands, and afterwards *B.* dies, and the heir of *A.* enters into the lands of *B.* he shall be decreed to levy a fine and convey, because he has entered upon the recompence which the father received for such estate tail, which is making himself a party to the original agreement, and therefore he is bound in conscience to execute it. *Rosse v. Rosse*, *Eq. Abr.* 265. *B. p. 2. Ch. Cas.* 171.

If a marriage agreement be made, by which the husband is to be tenant for life, remainder to the issue of that marriage, and the husband dies without executing such agreement by proper conveyances, leaving issue *A.* and *B.* and *A.* to whom the legal estate of the lands descends, makes an agreement upon valuable consideration, as to settle the lands for payment of debts, or upon marriage, not only the issue of *A.* but likewise of *B.* shall be bound to perform such agreement; because *A.* was master of the legal estate, and was so far likewise master of the equitable estate, that if marriage articles had been specifically performed, he might have barred his estate tail by the ceremony of a recovery, and therefore equity looks on him to have a proper dominion of the thing itself, and consequently when he articles concerning such estate no fine is needful, by reason the marriage articles were not executed, the issue shall be barred by the agreement only, since he that had the dominion over the estate, has disposed of it according to his legal power for valuable consideration, and since the estate was, at the
time

time of such disposal, in such condition that no fine or recovery was necessary at law for disposing of it. *Norcliffe v. Worsely*, Rep. Temp. Finch 128. Ch. Cas. 234. 3 Ch. Rep. 29. *White v. Thornburgh*, 2 Vern. 702. Gilb. Eq. Rep. 107. Pre. Ch. 425. 2 Eq. Abr. 714. p. 2. *Powell v. Powell*, Eq. Abr. 265. (B) p. 3. Pre. Ch. 278. *Hill v. Carr*, Ch. Cas. 294.

Parol agree-
ment.

There was a bargain to freight a Ship, without any certainty in the charter-party, of the value of the freight *per* ton, and the merchant freights the ship with box-wood, which pays but forty shillings, and not with cotton that pays five pounds *per* ton; the master would have proved a parol agreement to freight it with cotton, and the merchant would have excused the not freighting with cotton, because the cotton was destroyed that year by the locusts; the court thought that the master not having ascertained his freight in the agreement, that he ran the risk of the voyage to receive freight according to the usual rates paid for such goods wherewith the ship was laden, and that it was a dangerous thing to add to the written agreement, by any words that might pass between the parties at the time of making the agreement, in a case where there appeared to be no fraud in leaving out any thing in the charter-party, that was intended by the parties; for where there is a written agreement, the whole sense of the parties is presumed to be comprized therein, and all discourse tending to introduce such agreement goes for nothing. *Foot v. Solway*, 2 Ch. Cas. 142. But *quære* whether the merchant by the excuse,

excuse, does not admit the agreement as set up by the master.

If a decree be had in a court of equity, an execution of it shall not stay on affidavits of a parol agreement, but the party must bring his original bill, that the other party may be let into the benefit of his defence; for to suspend a decree upon motion, is the same as to set one side upon motion. And some have said you cannot set forth a parol agreement, in an answer to a bill to revive a decree, in order to stop it; * *sed quære*. *Wakelin v. Walthal*, 2 Ch. Cas. 8.

A man buys a copyhold, and to avoid the charge of a new fine upon the descent of it to his son, surrenders it to the use of himself for life, remainder to his son in fee, and then upon the marriage of his son, to induce the match, tells the lady's relations that he had provided for the son by the copyhold, and then marriage articles were made, whereby leasehold lands were settled on the son and the issue of that marriage. The father afterwards marries a second wife, and agrees to settle the copyhold on the wife and the issue of that marriage. The wife by her † *procchein amy* brings her bill against her husband and the son, to have this copyhold settled, but dismissed as to the son; for the copyhold being settled by a proper conveyance, and being made a reason to induce the match with the son, became a valuable settlement, and to settle it again was but § *actum agere*, and so the compre-

* But quære. † Her next friend. § To do what had already been done.

hending it in the other settlement was improper, since it could not pass by it, but by copy only. And here the son's wife did not set up her rest in the written agreement, because the match was likewise founded on the copy of court-roll, whereby the estate was passed to him before. *Kirk v. Clerke, Pre. Ch. 275.*

A settlement was made upon marriage to the husband for life, remainder to the heirs of the body of the husband, begotten on the wife, and the husband covenants not to suffer a recovery, and has two daughters by the match, one of which dies, and the other he marries and gives a fortune to, and then he suffers a recovery of his estate, and devises it away from his daughter, and the daughter with her husband comes into chancery to have a specific performance against the devise, but were dismissed; because by the marriage settlement which was executed before marriage, the estate was settled in such a manner as gave the father a power to destroy it; and being settled with a personal covenant not to make use of that power, the daughter has remedy only upon the person to have reparation in damages, if the covenant be broken. For they cannot prevail in a court of equity to set aside the recovery and uses, for that would be to alter the power which the father had by the original settlement over the estate, which instead of specifically executing an agreement would alter it. *Collins v. Plummer, 2 Vern. 635. Wms. Rep. 104.*

This case was observed by my Lord Cowper to be different from articles before marriage; for if articles had been made in that manner, a court of equity would have executed such
articles

articles by settling it upon the first, and every other son, so as to prevent the husband's power over the estate. *Ibid.*

If a wife has a separate maintenance, and Separate contracts to pay the debts of her husband, she ^{maintenance.} shall be bound to execute such contract out of her separate maintenance; and if the husband be joined for conformity, process shall run against the wife without him. *Bell v. Hyde and his wife, Eq. Abr. 65. p. 8. Pre. Ch. 328. Gilb. Eq. Rep. 83. 3 Wms. Rep. 38.*

If articles be made between husband and wife before marriage, in which there is an estate settled on the part of the husband, and likewise another on the part of the wife, in which the limitations are, that it shall be the husband's for life, remainder to the wife for life, remainder to the heirs of the body of the wife by the husband to be begotten: there if they come into a court of equity for a specific execution of these articles, the court will provide not only for the sons of that marriage by proper limitations, but likewise for the daughters. But if they should execute the articles *before* marriage, by a limitation to the husband and wife for life, remainder to the first and every other son in tail, with a remainder to the heirs of the body of the wife by the husband to be begotten, this would be a good execution of the articles before marriage, because it shall be presumed that that part of the agreement relating to the daughters is relinquished, and the last intention of the parties was, that both should have the joint dominion over the estate during their lives, in case of failure of issue male. But if such an agreement

agreement was thus executed *after* marriage, that would not be a good execution; because where land is settled on both sides, and the articles have made both estates a provision for the children, they cannot alter it after marriage. And if they should settle the lands to the first and every other son, with a remainder to the heirs of the body of the wife by the husband to be begotten, such a settlement *after* marriage would be bad, because they are reciprocal purchasers of both estates, not only for themselves, but for their issue. But where a wife before marriage entered into articles, as to her own estate, to settle it to the husband for life, then to herself for life, remainder to the heirs of her body by her husband to be begotten, and the husband after marriage consents to settle it to the first and every other son in tail, with a remainder to the heirs of his wife by him to be begotten, and had issue a daughter and died, and his wife married a second husband, and then by fine and recovery, together with her husband, made a new settlement of her estate, and upon this the daughter exhibited her bill to have an execution of the articles; the bill was dismissed; because the husband who was * *sui juris*, might relinquish after the marriage, more dominion to the wife, over her estate, than he had stipulated for in the marriage articles, and the wife might accept it, having received nothing in lieu thereof by an equivalent purchase of an estate from the husband, and such settlement must be looked upon as an equitable

* His own master.

execution of the agreement, otherwise, the wife would disinheret her son by the second husband in favour of a daughter by the first, from whom she received no estate at all.

Burton v. Hastings, Eq. Abr. 393. p. 4. Gilb. Eq. Rep. 113. 2 Mod. Cas. 131.

An husband gives a bond upon his marriage, conditioned to settle his copyhold estate to the use of himself for life, remainder to the wife for life, remainder to the heirs of their two bodies, with remainder to the heirs of the husband; and a bill is brought to compel a performance: a court of equity would not leave them to the penalty of the bond, but decreed a settlement to the use of the husband for life, remainder to the wife for life, remainder to their first and every other son in tail general, remainder to the daughters of their two bodies to be begotten in tail general. *Nandike v. Wilkes, Eq. Abr. 393. p. 5. Gilb. Eq. Rep. 114.* For though they anciently thought that where there was a bond to perform any thing, that the obligor was obliged to the alternative, either to perform the thing or pay the money, and therefore that the obligee set up his rest in the penalty. Yet now they don't take it as an agreement in the alternative, in which the obligor may either pay the money, or perform; but they understand the penalty only as an enforcement of the agreement, and as giving a remedy at law for a certain sum instead of uncertain damages, and the party by his providing his remedy at law shall not take away his remedy in equity. *Bagg v. Foster, Ch. Cas. 188. 3 Ch. Rep. 50.* which is contrary to the modern resolution

solution in *Nandike v. Wilkes* before mentioned.

A man covenants to convey his copyhold to his bastard child, and to make further assurance. And he does admit his bastard child, but without a surrender, whereby the copyhold does not legally pass, and dies, and the natural daughter brings her bill against the heir at law to supply the defective conveyance, because there being no surrender the admittance was void; but the court would not do it, because the daughter was a meer stranger, being * *nullius filia*, and not taken notice of by the law as a daughter, nor the father under any obligation to provide for her as a child, since that arises from the mutual contract of cohabitation during life, which is marriage; and there being no consideration for such conveyance, it is merely voluntary, and in such cases a court of equity has no foundation to give remedy against the heir. *Fursaker v. Robinson*, *Eq. Abr.* 123. p. 9. *Pre. Ch.* 475. *Gilb. Eq. Rep.* 139. *Fairbeard v. Bowers*, *Eq. Abr.* 143. p. 15. 152. p. 4. 2 *Vern.* 202. *Pre. Ch.* 17.

Statute of
frauds, 29 Car.
2. c. 3.

If upon a marriage treaty the counsel takes down from the mouth of the father the marriage agreement, and the father dies next day before any agreement is perfected, and the young couple marry, the court will never decree the heir or executor of the father to execute the agreement, because such agreement is but † *feri* and not compleated, and therefore it might be altered or changed till the parties

* No one's daughter. † To be done.

come

come to sign and seal; for this instruction of counsel is but a preparation; and upon looking into the title of the estate to be settled, something may arise that may alter the whole, or break off the agreement; and prudent men read even the drafts before they are engrossed, which are subject to alteration and amendment. But if the young couple had married by the consent of the parents before such ingrossment, such agreement would have bound, and would have amounted in a court of equity to an authority to the counsel to write down such agreement; because the young couple enter into the match upon the father's faith to perform; but otherwise if they had married without the consent of the father, while such agreement was * *in fieri*. *Bard. v. Amburst, Eq. Abr. 20. p. 6. 21. p. 8. Pre. Ch. 402.*

Articles of marriage were made whereby the husband was to leave two thousand pounds to his wife at his death, and to settle on her a rent-charge of one hundred *per annum* for life out of lands to be purchased. The husband having made no purchase nor settlement of the one hundred pounds, makes his will, and therein taking notice of the articles devises two thousand pounds to his wife, and the residue of his personal estate to trustees for the purchase of lands to be settled for securing the one hundred pounds to his wife during her life, and subject thereto, to the use of his nephew in tail general, with several remainders over, and dies; and the nephew brings his bill for an account of the residue of the

* To be done.

personal estate, and that it may be paid to him on his giving security to answer the one hundred pounds *per annum* to the wife, and decreed accordingly, and the plaintiff entered into a recognizance to perform the decree; for they looked upon the person who was to be the tenant in tail upon the purchase, to have the dominion of the estate, and so to be intitled to the money wherewith the purchase was to be made, at his election. And this money is to be paid to the wife without deduction for taxes, because the tenant in tail having made an election to take it as a personal estate, cannot leave taxes on it as if it were real, the law having charged the real estate only with taxes, and the wife was allowed in this case to have interest for such part of her annuity as was in arrear from the time that the arrear incurred, because it was secured by recognizance, which penal security always imports, that the party is to pay at the time, or allow interest. Contrary opinion as to the money's being paid to the tenant in tail. *Legate v. Sewell*, *Pre. Ch.* 548. *Eq. Abr.* 389, 394. *p. 7.* 2 *Vern.* 551. *Gilb. Eq. Rep.* 145. *Peer. Will.* 87, 90, 91.

If quarrels happen between husband and wife, and the wife libels in court christian for a separation and alimony; and to quiet this suit, the husband enters into an agreement with a third person, to pay the wife so much a year, by way of a separate maintenance; tho' a court of equity will not decree alimony, because it belongs to the jurisdiction of the ecclesiastical court to inquire into family secrets, yet the court will decree a specific execution of

of this agreement of the husband, because he ought in conscience to perform his agreement, and no other court has a proper jurisdiction to decree such performance. *Angier v. Angier*, *Gilb. Eq. Rep.* 152. *Pre. Ch.* 496.

Secondly, Trusts and Portions.

TRUSTS are the original creatures of the court of chancery, and were as ancient as the court itself, on the *English* side; and to remedy breaches of trust was the first reason of the institution of that court. For from the time of the statute of *Mortmain* ecclesiastical persons used to take lands in trust for themselves, and civil persons were tenants of the estate, and liable to the feudal duties. And tho' this in the first institution answered, yet afterwards when the heirs came in by a long course of descent, they thought it hard to answer the feudal duties, and yet to be accountable to the church for the profits. This the rules of the common law would not oblige them to, and therefore it was necessary that a court should be instituted to deal with the corrupt conscience of the party if he did not answer the trust.

The court was complained of in its original, but afterwards when the wars of *Lancaster* and *York* came on, the laity also found it necessary to put their lands into the hands of trustees, that they might not forfeit upon those changes of times; and from thence the court of

chancery intermeddled and managed trusts as their own creature, and from thence they came into those rules that have been settled in the court of chancery touching alienations. So that if a man had aliened without a valuable consideration, there was a resulting trust to the feoffor, that always run with the lands into whatever hands they came without a valuable consideration; or if there was a valuable consideration, yet the trust run with the lands if the feoffee came in with notice of such trust. This was thought so inconvenient to feudal tenures, that the 27 of *H. 8. c. 10.* was an endeavour to execute the freehold in him that had the trust. But they soon fell into a new manner of conveyancing, whereby those trusts were revived, and again managed as creatures of the court of chancery; for persons could not settle their estates to themselves for life, with remainder to their first and other sons, with terms created for younger children's portions, without declaring the trusts of such terms.

And from hence they came to a resolution, that where an estate was given to *A.* and his heirs, to the use of *A.* and his heirs, in trust for *B.* that the first use was executed, and the trust remained in *B.* as before the statute. For the common law could not execute the second trust, but rejected it as void and repugnant to the first use. But the court of chancery considered *A.* as trustee for *B.* and therefore *A.* was bound in conscience to perform such trust, for the chancery considered that as the intent of that conveyance, tho' the com-
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mon law rejected it as repugnant and void.
Simpson v. Turner, Eq. Abr. 220. p. 1. 383. in
note (A) Treat. Eq. 54.

There is a very modern resolution, that in case of a will where a man devised an estate to trustees to the intent to permit *A.* to receive the profits during his life, with a proviso, that *A.* might make a jointure to his wife, and afterwards that the trustees should stand seized to the use of the heirs of the body of *A.* That this was an estate tail executed by the statute, because trusts and uses are all one, and here is no double use to be executed, and the power of making the jointure might arise under the will, notwithstanding the estate tail was executed in *A.*

Broughton v.

Langley,

2 Salk. 679.

Lutw. 814,

Holt 708.

Burchet v.

Durdant,

2 Vern. 312.

See Eq. Abr.

383. p. 3.

where this case

is held not to

be law.

Hence also it came to pass, that all trusts which could not be executed by the statute, remained under the disposition of the court of chancery, and therefore the common manner of settlement was to the first and every other son, with trustees to support contingent remainders; and such trustees had the right of entry, in order to preserve such contingent remainders till they came in *esse*, for where there were not such trustees, according to the resolution of *Chudleigh's case, Co. Rep. 120. Poph. 70. Jenk. 276, and 309. 2 Danv. 177. p. 2. 3 Danv. 183. p. 2. 225. p. 7.* if the father had aliened, it destroyed the contingent remainder; because it could not vest at the determination of the particular estate; and therefore the trustees to support contingent remainders were interposed, that if they concurred in the

Piev. George, alienation of the tenant for life, it was a breach
 Eq. Abr. 384. of trust, and if the alienation was with no-
 E. p. 1. tice, the alienee was subject to the trust; if
 2 Salk. 680. without notice, then such trustees were liable
 Pre. Ch. 308. to make compensation out of their own
 Peer. Will. 128. estates.

And now also we are to consider what resolutions have been upon the trusts of terms in such marriage settlements.

Trusts of terms in marriage settlements.

Lord Teviot
 v. Lady Spence,
 Pre. Ch. 5.
 2 Eq. Abr.
 350. p. 1.

A MAN settles the manor of *Sale* to the use of himself for life, and after to trustees for twenty-one years, to commence from his death, and then to his son in tail, with remainder to his own right heirs, and the trust of the term was, to raise five thousand pounds, two thousand pounds thereof to his eldest daughter at her age of eighteen, or day of marriage, and the other three thousand pounds to be equally divided among his younger children at their respective ages of eighteen, or day of marriage. The son dies without issue, and then the father, having issue four daughters, makes his will, and thereby devises the manor of *Sale* to his wife for life, in augmentation of her jointure, remainder to his four daughters as his heirs at law, and provides that the manor shall not be charged in the hands of his wife with any portions, then he dies, and his eldest daughter
 having

having married brought her bill against the wife, her three sisters, and their husbands, and the trustees of the term, to have the two thousand pounds raised and paid to her and her husband; and decreed that she must have one thousand pounds more than the other sisters, and if the three sisters did not agree to pay three fourth parts of that one thousand pounds out of their shares of the land, the trustees should raise it, and the mother to be reimbursed out of the inheritance, that her estate for life should not be damnified in the matter, because the term was yet standing out in the trustees to raise the money, and therefore was not merged at law by the devise of the inheritance to the daughters, and there was no equitable merger of the term by the devise of the inheritance to them, because the benefit of the inheritance was devised equally to them, without expression of the intent of the testator to alter or change the precedent trusts of the term; but on the contrary, the testator takes notice of it as a subsisting term, because by his will he provides that it should not be charged with portions in the wife's time; and therefore since by that trust the eldest sister had the advantage of one thousand pounds above the rest, it was just that the term should stand in a court of equity to raise that sum, and if that prejudiced the interest of the mother, she ought to be reimbursed out of the inheritance.

But where an estate is limited in a marriage settlement to the trustees and their heirs, to the use of them and their heirs in trust for the husband for life, remainder to the wife for life

Pawlet v.

Pawlet, Eq.

Abr. 267. p. 1.

2 Vent. 366.

2 Chan. Rep.

286. Vern.

for 204, 321.

for her jointure, with a power to the trustees to raise one thousand pounds for a daughter if but one, and two thousand pounds if more than one, remainder in trust for the first and every other son in tail male, with remainder to the right heirs of the husband. The husband dies, leaving issue a son and daughter, the son dies, and then afterwards the daughter dies, and the mother took out administration to the daughter, and the estate descended to a remote relation; there it was agreed that the descent of the fee simple merged the power which was only projected for her benefit before the fee was vested in her; and this was as much a merger in a court of equity as if the fee simple had descended upon a term for years. But if the daughter had died first, so so as there had been no merger by the descent of the fee, then the mother would have been intitled as administratrix, because the money was vested in her, and there would be no descent of the inheritance to merge that power whereby the money was to have been raised.

Rules of merger of terms.

So that the rules touching merger are, that if a man has the same interest and absolute dominion and property in the whole inheritance, as he has in the term or power for raising money out of the inheritance, there it must merge, for a man cannot have power to raise money for my benefit out of that which is mine; but if there be any difference between the two interests, or any other person intermediate, then there can be no merger; for if there be any merger in the first case, it will change the intent of the conveyance, and in the

the other case there being an intermediate estate there is no merger at law, no more than there is in a court of equity in the case of a trust.

A man upon the marriage of his son settles lands to the use of himself for life, then to trustees for the term of ninety-nine years, then to the son in tail general, with remainder over, and the term is to raise two hundred pounds a-piece for the daughters of that marriage, the marriage takes effect, the father and son die, the son leaving issue two daughters who were intitled to the remainder in tail, and the question was whether the term should stand in their mother's way to prevent her dower; and decreed that it should, unless the mother would pay the two hundred pounds a-piece to the daughters to discharge it; because here likewise there is no legal merger of the term, and therefore the dower is subject to the term and the trust of it, such term and the trust of it being precedent to the marriage, and therefore the wife must disincumber the estate from this charge in that proportion that her interest as doweress bears to the inheritance, that is to say, as a third of a third, that is, as one sixth bears to the whole, and so she ought to pay sixty-six pounds thirteen shillings and four-pence. *Rives v. Rives*, 2 Eq. Abr. 223. p. 2.

If the husband seised of lands in fee, to disappoint the wife of dower, without notice to the wife, carves out a term, and then marries and dies, the heir shall never set up this term against the wife, because it is fraudulent in the creation, and it was contrary to conscience

Brown v. Gibbs, 2 Eq. Abr. 385, p. 2.
Pre. Ch. 97.
2 Freem. 233.

Terms to prevent dower.

science to disappoint the wife by such male-practice.

Hardress 489.

If a man purchase an estate, and assigns a term to protect it against mesne incumbrances, and afterwards marries and dies, it seems that a court of equity will not permit the heir to set up this term against the wife, tho' it was not fraudulent in its creation; because the design of the term being only to protect the inheritance, it is against conscience to set up such a term contrary to the design of its creation, and the heir is considered as a trustee to assign dower to the wife, and to hand to her the legal provision, and therefore should not set up this interest against it.

But if in such case the husband had aliened the inheritance, and assigned such term to a trustee to protect the inheritance, if the purchaser paid a price, tho' he had notice of the marriage he may set up this term against the wife, because she having married the husband without any jointure or provision by contract out of the estate, the wife puts herself totally into the power of the husband, and consequently she was liable to all the legal power the husband had over the estate; and therefore when he disposed, as by law he might, she can never claim it afterwards; because she by her imprudent marriage submitted herself to such power of disposal. And this was compared to the original cases in equity, that a woman was not dowable of a trust in fee, because the seisin was in another; so that she ought to provide by a contract to have a subsistence out of it. Tho' I am apt to think such original constructions came from the eccle-

ecclesiastical notion, that such estates should be entirely free, that they might be disposed of to pious uses. And so it seems the distinction is at this day, that if the husband seised in fee, just before the marriage should put the legal estate into the hands of trustees to disappoint the wife of her dower, that such a conveyance would be reckoned fraudulent, because that conveyance was made with an ill conscience and an evil intent, in order to deprive the wife of the provision made for her by the common law.

But if the husband was possessor of a trust estate by descent or purchase, and should afterwards marry and die, the chancery at this day would never endow the wife of this estate, because the wife is not endowed at the common law; but where the husband is seised of the freehold (and consequently the whole trust estate being in the husband's power at the time of the marriage), the court of equity could not take it out of him, unless the wife had contracted for such a provision. *Bothomley v. Fairfax, Eq. Abr. 144. p. 19. 217. p. 2. Pre. Ch. 336.*

If a man limits a term to raise younger children's portions, to be paid at the age of twenty-one years, or day of marriage, and there are younger children born, and they die before twenty-one, or day of marriage, the portions shall sink for the benefit of the persons who are to take the remainder by the settlement, because the intention of the settlement is, that the eldest sons who are in the remainder by such settlements should take it in the most beneficial manner that may be, where such provisions

provisions are not necessary (Lord *Rivers v. Lord Darby*, *Eq. Abr.* 268. p. 7. 2 *Vern.* 72.) to be raised, and such provisions are not necessary to be raised when the child dies who is to be provided for; and this is following the intention of the settlement as near as possible, that all the parts of the family may be provided for out of the estate in the best manner. Lord *Pawlet's case*, 2 *Vent.* 366. 2 *Freem.* 76. 92. *Eq. Abr.* 267. p. 1. *Vern.* 204, 321. *Pre. Ch.* 317. 2 *Chan. Rep.* 286.

So it is where a term is limited after the decease of the father to pay younger children's fortunes within one year after the commencement of the term, and interest to them in the mean time for their maintenance; there if one of the children dies within the year, her fortune shall sink for the benefit of the heir at law, because this also is not to be raised by the intention of the settlement till the time therein limited. *Tournay v. Tournay*, *Pre. Ch.* 290. 2 *Eq. Abr.* 654. p. 6.

See *Treat. of Eq.* 79. And there is a difference between this and the construction of legacies. For if one hundred pounds had been devised to a man, payable at his age of twenty-one years, this is Note (a). * *debitum in præfenti*, tho' † *solvendum in futuro*, Dyer 59. and therefore if the legatee dies before twenty-one, it shall go to his executor or administrator; but otherwise it is in a personal estate if Leon. 177. the legacy had been bequeathed at twenty-one. Wentw. Off. Exec. 347. Swinb. 311, 312. 2 *Vern.* 92, 416, 508, 617, The reason of this difference is, because the 2 *Vent.* 366. personal estate is a § *fidei commissum*, and the 367.

* Due immediately. † To be paid hereafter.
§ Trust.

executor

executor a * *fidei commissarius*, and therefore he is only to dispose of the personal estate as the testator has appointed; and therefore if the legatee dies, the interest of the legacy is not to sink for the benefit of the trustee, but to go to the representative of the *cestuique trust* to whom the benefit of it is bequeathed: and the chancery follows the practice of the spiritual court, which had the original jurisdiction of legacies. But if the devise were to the legatee at twenty-one, there if he dies before twenty-one it must sink into the personal estate, because only severed from it in behalf of a legatee of twenty-one years old, and therefore cannot go to the representative of the person who never attained that age.

So if a portion were devised out of lands ^{2 Ventris 366,} to A. to be paid at his age of twenty-one, if ^{367.} A. dies before that age, yet the portion shall not sink for the benefit of the heir, but shall be construed as a legacy and not as a trust, because the heir can pray in aid of the personal estate to exonerate the lands, and therefore this bequest is construed as a legacy, since it first bottoms on the personal estate, and is only to be paid out of the lands in all events. *Globberie's case*, *Eq. Abr.* 294. p. 1, 2. 2 *Vent.* 342. 2 *Ch. Cas.* 155. 2 *Nels. Ch. Rep.* 195. 2 *Eq. Abr.* 539. p. 1. 2 *Freem.* 24.

But if a man devises particular lands to a stranger, and a legacy out of them, there the stranger shall not pray in aid of the personal estate as the § *hæres natus* or || *hæres factus* of the

* Trustee.

§ Heir born so.

|| Heir made so.

whole

whole inheritance should; yet here such portion to be paid at twenty-one, shall be taken as * *debitum in præsentibus*, tho' † *solvendum in futuro*, because the stranger is but § *fidei commissarius quoad* the profits of that part of the real estate which are devised from him. *Gower v. Mead*, Pre. Ch. 2. *Elliot v. Elliot*, Eq. Abr. 381. p. 6. 2 Ch. Cas. 23. *Scroop v. Scroop*, Eq. Abr. 381. p. 6. Ch. Cas. 27. 2 Freem. 171. *Ebrand v. Dancer*, Eq. Abr. 382. p. 11. 2 Ch. Cas. 26. *Grey v. Grey*, Eq. Abr. 270. p. 9. 381. p. 6. Ch. Cas. 296. Rep. Temp. Finch 338.

Lord Rivers
v. Lord Dar-
by, Eq. Abr.
268. p. 7.
2 Vern. 72.

If in a marriage settlement there be a term to raise one hundred pounds a-piece for younger children, and there be no time limited for the payment, there it is due and payable to such children as soon as ever they are born; and therefore if they die before twenty-one, it shall go to their executors or administrators, because if it had been raised immediately, the money would have gone to their executors or administrators; and where it ought to have been raised immediately, it is looked upon in a court of equity according to the rule of the civil law to be raised, for || *qui habet remedium ad rem, ipsam rem videtur habere*.

Purchase made
by the father
in the name of
the son.

Elliot v. Elliot,
Eq. Abr. 381.
p. 6.

2 Ch. Cas. 23.

Where a father purchaseth any lands, during the minority of the child, in the name of the child, without a declaration of trust in the deed, and takes the profits during the minority, such purchase is an advancement for the

* Due immediately. † To be paid hereafter.

§ A trustee as to. || He who has remedy for a thing, is looked upon to have the thing itself.

child,

child, because the father is bound to provide for him, and his purchasing in his name shall be construed in a court of equity as fulfilling that obligation, and the taking the profits during the minority only as guardian to his son.

Mumma v. Mumma, Eq. Abr. 382. p. 8. 2 Vern. 19.

But if the father purchases in the name of his son who is of full age, which by our law is an emancipation out of the power of the father, there if the father takes the profits, or lets leases, or acts as the owner of the estate, the son is a trustee for the father, because there is the same resulting trust as if the son were a stranger, where the father acts as owner of the estate, since it was purchased with his money.

But if the father had let the son continue the possession from the time of the purchase without acting as owner, there it is an advancement, because the legal interest being in the son, and the father permitting him to act as owner of the estate from the time of the purchase, does as much declare the trust for the advancement of the son, as if it had been declared in express words in the deed. If the father dies leaving the children in the guardianship of the grandfather, the same rule obtains.

In the case of *Elliot v. Elliot*, there is a distinction taken between a purchase in the name of a stranger and of a son; in the former the trusts result to him who paid the money, and he may declare the trusts at any time; but in the case of the son the consideration of blood raises an use at common law, and therefore the trusts must be declared upon the pur-

purchase, or afterwards the father shall not be received to do it. Agreed that if the father at the time of the purchase really intended it for a provision, no subsequent declaration of his could alter it, and the circumstances must govern.

Another difference is taken between a purchase in the name of a son and of a daughter, for tho' sons are often provided for by settlement of lands, yet daughters seldom are, therefore the presumption not so strong.

A purchase in the nephew's name is in the name of a stranger, and no difference between a purchase taken in another's name or a conveyance made to another.

If a man purchases a copyhold with his own money to himself, his wife and his daughters; and their heirs, this is an advancement for the wife and his daughters; but if this be after marriage, and he surrenders the copyhold for the security of money, such mortgagee is intitled, notwithstanding the settlement. Tho' the commissioners seem to have decreed the contrary, which decree cannot be allowed unless the purchase was made in pursuance of articles before marriage, or as a settlement upon the daughter on her marriage, for otherwise it is only a conveyance for natural affection, which hinders any resulting trust to the ancestor, but does not hinder the

(a) Corbet v. Maidwel,
Salk. 159.
Eq. Abr. 337.
p. 5.
2 Vern. 640,
655.
3 Ch. Rep.
190.

carrying it over to a purchaser.

(a) If in a marriage settlement the estate be limited to the husband for life, and to the wife for life, the remainder to trustees for five hundred years to raise younger children's portions,

to

to be paid to them at their age of eighteen years or day of marriage, remainder to the first and every other son in tail male, with remainders over; there, if any younger children attain to the age of eighteen in the life of the father and Mother, they are intitled to have their portions raised by the sale of this term in reversion; because the term is an interest vested in the trustees, which they can sell, and therefore by the words of the trust they may be compelled to sell it, for the father has put such term out of his power during his life where he has vested it in another; and if fathers will be so indiscreet as to vest such power in trustees, by their marriage agreement that other persons shall raise out of their estate portions for their children, they must be content to abide by it; for when the fortune is made payable at the age of eighteen, or day of marriage, it does not appear to be the intent of the trust that the children should stay any longer, therefore the court will decree such portions to be raised immediately.

If an estate were limited in a marriage settlement to the husband for life, then to the wife for life, then to trustees for five hundred years, to raise portions for younger daughters, payable to them at the age of eighteen or day of marriage, if the father dies without issue male begotten on the body of his wife: the wife dies, leaving daughters only, who attained their age of eighteen, and preferred their bill in their father's life time for their portions, and had them decreed to them by sale of the term; because after the death of

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the wife the provision is not contingent, but becomes absolute; for the only contingent part of the proviso is, whether the husband shall die without issue male from that wife, and not whether he shall die or not, for that is certain; and the wife being dead there can be no issue male from her, and therefore in all events the portions are to be raised; and this the rather because it does not clog the fortune of the eldest son, but he in the remote remainder, for whom less regard is presumed to be had than for the issue of that marriage which is to be provided for out of the estate.

So it is if the term itself were limited to trustees in case the husband dies without issue on the body of the wife, for the contingent part of the proviso falls off upon the death of the wife, and so the term vests in the trustees. But they never let the trustees sell or mortgage the reversionary term for maintenance. *Lady Pierpoint v. Lord Cheney, Pre. Ch. 503. Peer. Will. 488. 2 Eq. Abr. 642. p. 10.*

Corbet v.

Maidwel, Eq.

Abr. 337. p. 5.

2 Vern. 640,

655.

3 Chan. Rep.

190.

Salk. 159.

But if there be a marriage settlement in which the estate is limited to the husband for life, remainder to the wife for life, remainder to trustees for five hundred years for raising two thousand pounds for daughters, remainder to the heirs male of that marriage, and if the husband dies without male issue of that marriage, then such sum to be paid to such daughters as should be unmarried and unprovided for upon the death of their father, at their age of eighteen or day of marriage, and the wife dies, leaving issue daughters only; here since the limitation of the trust of that term

is for daughters unprovided for at the death of their father, the portion shall not be raised during his life, because this depends upon an event which can never be seen whether it will happen during his life, that is, whether he will provide for his daughters or not, and therefore the contingency does not fall off during the life of the father as it did in the former case.

If a father limits or devises portions to his daughters or younger children, payable at their respective ages of twenty-one years, or any other certain time, without making any other provision for their maintenance in the mean time, and dies; in this case they shall have interest for their portions from his death till paid; because the father, if he had lived, was obliged by the law of God and nature to have provided for them. But if such portions had been provided in such manner by a stranger, then they should not have carried interest in the mean time for the children's maintenance; because it was meer bounty in the stranger, and he was under no such obligation as the father to provide for them, and therefore his provision shall be carried no further than he has appointed it.

If a woman has a fortune left her, and she marries during minority, the trustees who are to raise such fortune, or the executor, who by will is to pay it as a legacy, may come and insist to have the fortune settled, not only against the husband himself, but even against the creditors of the husband, if he has assigned such fortune over for the payment of his debts; because the King is an universal guardian

Attorney General v. Thompson, Eq. Abr. 301. p. 2. Pre. Ch. 337.

Moore v. Ri-
cault, Pre. Ch.
22.
2 Eq. Abr. 51.
p. 1. 478. p. 3.

dian to infants, and ought in the court of chancery to take care of their fortunes. And tho' by the ecclesiastical law she is at age to marry, yet by the temporal law she cannot dispose of her fortune, and therefore the court will make such disposition of the fortune of the ward as may be most beneficial for her. But if she was at full age at the time of her marriage, then she was out of the care of the court, and since she might dispose of her person and fortune, if such fortune was assigned to the creditors of the husband, they may prefer their bill against the trustees or executors to have the fortune, and accordingly it has been decreed.

Baron and
feme.

As to the interest between husband and wife, the rules of equity generally follow the rules of law, and therefore where an husband married a lunatic who was under the care of the court, without the leave of the court, which marriage was sentenced to be good in the spiritual court, tho' the court committed him for his contempt, and ordered him to make a settlement equal to the wife's fortune, which he did not, but died in contempt, and his wife died soon after without issue: The personal estate, as jewels and money, which were in the custody of the court, were decreed to the administrator of the husband, because it belonged to him by law. For tho' the court of equity would so far take care of the lunatic who was under the guardianship of the court, that the husband should make a settlement equal to her fortune, yet when the reason of the provision was at an end, the court which only held the stake, could not alter the property of the fortune, which was transferred

transferred by law from the wife to the husband.

So the court allowed that the husband might ^{Terms for]} dispose of all terms for years which he had in ^{years.} right of his wife, and of all terms for years which were held in trust for her, because the law gives him the disposition of such terms for years, for they are chattels, and therefore under the dominion of the husband; but if he does not dispose of them they survive to the wife, because the limitation in such contracts being made to the wife and her representatives, they cannot be claimed * *jure repræsentationis* during the life of the wife.

So if the husband survives, the term is to go to him, his executors or administrators, because it cannot go to the representative of the wife, for the husband both at and after the death of the wife had the dominion over it, and therefore the executors of the wife cannot come and claim it, because she had disposed of it herself, by putting it under the dominion of the husband by her marriage. *Packer v. Wyndham, Pre. Ch. 312. Gilb. Eq. Rep. 98. 3 Peer Will. 199.*

The same rules obtain in equity as to the disposition of the trust of the wife's term.

But if the wife takes a mortgage of lands ^{Packer v.} in fee, there the husband cannot dispose of it ^{Wyndham,} without the consent of the wife, because a fine ^{above.} is necessary for the disposing of lands in fee; and therefore if he should dispose of it without a fine, the wife or her representatives may

* By right of representation.

enter and recover the land, and consequently the money for which it was pledged.

If the husband has a bond or chose in action of the wife, and should assign such bond without a valuable consideration, yet it shall continue to the wife after the death of the husband notwithstanding such disposition, because such disposition is void at law, it being a chose in action, and it cannot be set up in a court of equity, because it is a meer voluntary conveyance without a consideration. But if the husband had assigned such bond upon valuable consideration, it seems a court of equity will make it good, because a husband may provide for his family out of the chattles of the wife, and therefore has an equitable power over them.

Pheasant v.
Pheasant, Eq.
Abr. 156.
p. 11.
2 Vern. 340.
Chan. Caf.
181.
3 Chan. Rep.
69.

But where there is no settlement, tho' the wife by the marriage become intitled to and recover dower, yet if the husband in his life time does not recover the debt due by bond to the wife, this being a chose in action, the wife shall have it, and not the husband's representatives; the husband having only an equitable power over such debts, and where he makes use of such power, upon valuable consideration, it is an equitable disposition of them. Or if the husband had made, or agreed to make, a settlement on the wife in consideration of the debt to the wife, there he had been a purchaser for valuable consideration, and his representative should have it against the wife's representative. *Meredith v. Wynne*, Eq. Abr. 70. p. 15. *Pre. Ch.* 312. *Gilb. Eq. Rep.* 70. 2 *Vern.* 448. Tho' there the

the settlement is not mentioned to be in consideration of her marriage.

Portions.

IF an husband settles a term of years upon Turner v. Trustees for himself for life, and then to his Bromfield, wife for life, for her jointure, and then the Ch. Caf. 307. husband dies, and the wife marries again, my Jacob v. Thatcher, Ch. Caf. 247. Lord *Nottingham* was of opinion that the Rep. Temp. Finch 197. second husband could not dispose of this term, without the wife's coming to be examined to her consent in the court of chancery. And this was upon the principle of making terms for years subject to the same conditions as if such provision had been made out of the freehold. And therefore he was of opinion that since a freehold jointure could not be aliened without a fine where the wife was secretly examined, so where the wife was jointured in the trust of a term, that should not be aliened without a secret examination in a court of equity. But this was thought to be a resolution that would confound the distinct properties of the chattle and real estate, and let in many arbitrary resolutions about them, and therefore this decree was reversed in the house of lords, and such terms, and the trust of them were as much under the power of the second husband who did not enter into any agreement concerning them, as any other terms or trusts of terms of the wife's whatsoever.

But the first husband who had entered into the agreement, and settled the term, could not dispose thereof to prevent the provision intended by the settlement.

If the wife possess of a term, and before marriage with a second husband, settles it on her children by her former husband, with power to revoke these uses, and limit new ones to such persons as she by her deed should appoint, which the husband signed; the second husband dies, and she marries a third husband: it was resolved by the court, that during the life of her second husband she might by her deed revoke the former uses and limit new ones, because the second husband's signing the deed was a consent to all the uses and powers in that deed, in the manner therein mentioned; and therefore a consent to her revocation of the former uses and limitations of new ones; and the subsequent deed is only a continuation of the uses declared by the first deed, so that all the uses arise out of the first deed to which the husband was consenting. But the third husband not consenting to that deed, the wife's power of revocation was suspended during the coverture, since she could do no legal act without the husband but by his consent, and the husband and wife cannot dispose of it, because by the trust it must be the meer act of the wife, and that cannot be, if it be under the influence of the husband; and therefore neither the wife alone, nor with the third husband, can dispose of it, during the coverture, in prejudice of the children by the first husband.

But if a woman possessed of a term for years, upon her marriage, conveys it to trustees for the use of her husband's creditors for ten years, and afterwards to such uses as she either sole or covert should appoint, and the husband agrees thereto: here the husband may dispose of this term after the ten years, because there was a resulting trust in the wife of the term, and such resulting trust is by the marriage under the power of the husband, because there are no negative words to make it a separate maintenance, and therefore if the husband disposes of it before any declaration made by the wife, since the resulting trust was then in her, such disposition will be good. And this is not like the former case, where the trust was limited to the children, which prevents all resulting trust to the wife. But it seems in this case that if the wife disposes of this trust before any disposition made by the husband, such disposition would amount to a declaration upon the first contract, and so would be good: because the husband consenting to such disposition, such uses will arise by virtue of the original deed to which he consented.

If a woman be jointured in freehold lands subject to a judgment, and the husband after marriage makes a lease of these lands to a third person who has notice of this marriage, but not of the jointure, and the husband dies, and the lessee purchases in the judgment to protect his term; here the notice of the marriage was construed by my Lord *Nottingham* as notice of the jointure: because marriages between persons of fortune are seldom made without

Pitt v. Hunt,
2 Chan. Caf.
73.
Vern. 18.
Deakins and
his wife v.
Berisford,
Chan. Caf.
194.

Constructive
notice.

without settling the wife in the land, and such constructive notice he held to be sufficient, because the wife being under the power of the husband could not give proper notice, so as to prevent the alienation of her interest. *Doyley v. Perfal, Eq. Abr. 57. Ch. Cas. 225. 2 Freem. 138.*

Purchase by a trustee.

If a trustee of an estate purchase in an incumbrance on that estate at an under value, or an executor purchase in a debt for less than is due upon it, this purchase is made for the benefit of the estate in one case, and of the testator's estate in the other, because he that takes upon him a trust, takes it for the benefit of the person for whom he is a trustee, and not to take advantage to himself, and therefore the purchase in these cases is for the benefit of the * *cestuique trust* and the legatees.

Mortgages.

But if *A.* purchase in a mortgage or incumbrance on the estate of *B.* at an under value, *B.* shall not redeem or take off the incumbrance without paying the whole money; because the whole money is due from *B.* and therefore he shall not profit himself of the contracts of *A.* But if *A.* mortgages to *B.* and afterwards to *C.* and *D.* purchases in the mortgage of *B.* at an under value, knowing of the mortgage to *C.* there *C.* shall redeem paying the money that *D.* gave; because *C.* was intitled to the redemption before *D.* intermeddled, and therefore *D.* could not intermeddle to crowd out any part of *C.*'s money that was secured on the estate; and therefore if *D.* has all the money that he laid out upon the purchase

* Person for whom the trust is.

chafe of the incumbrance, he ought not to hinder his neighbour from receiving his own money out of the estate; for then *D.* would receive his own from *C.* with unlawful usury.

But if *D.* was to receive the money from *A.* there he should have the whole money that *B.* lent, because as far as *D.* did not purchase at the price originally paid by *B.* it was the gift of *B.* But this shall not prevail as a voluntary disposition in the former case, because the money is presumed to be advanced by *D.* to keep out *C.* from the redemption, since he was under no necessity to come into this account, he shall come in as a lender, and so if he has his principal and interest paid it is sufficient. But if *B.* had offered the redemption to *C.* at the same value he sold it to *C.* and *C.* had refused it, there it had been otherwise, because then there was no injury done to *C.* by letting in another, when he had refused to take it, and therefore *D.* shall have the whole money due on the mortgage, and not what he gave only. Quere; if *C.* had notice of the whole money lent by *B.* before he lent any to *A.* whether *D.* might not have taken an assignment and challenged the whole money.

If a man settles or devises lands to trustees for the payment of debts, if there be any debts particularly mentioned, the purchaser must see to the application of the money, because it is an express trust that will run with the land, and the buyer must see it discharged: but if it be only for the payment of debts in general, there the trustee is only trusted with the application of the money, and the purchaser has no notice of the debts, and need not

What debts a purchaser must discharge.

not see to the application of the money. *Culpepper v. Aston*, 2 Chan. Cas. 115, 221.

If a man devises lands for the payment of debts, the personal estate must be applied in the first place, yet the purchaser is safe if he pays his money; because that is an accompt only to be settled with the heir by the trustee, and executor and the purchaser come in fairly to the disposition of the testator; but if the purchase had been * *pendente lite*, then the purchaser had made himself party to the account, because the estate itself is subject to the event of the decree.

Sir John Talbot v. Duke of Shrewsbury, Gilb. Eq. Rep. 89. Pre. Ch. 394. Backhouse v. Middleton, Ch. Cas. 173. 3 Chan. Rep. 39.

Where lands are settled and devised in order to raise money out of the rents and profits of such lands, for the payment of portions at certain and prefixt days, or for the payment of debts: here, tho' there be no clause of empowering the trustees to dispose of the land, for the purposes aforesaid, by sale or mortgage, yet if the portions cannot be raised out of the rents and profits, so as to be paid at the times appointed, nor the rents and profits answer the payment of the debts within a reasonable and convenient time, the trustees may sell or mortgage the lands, in order to fulfil the trust; because it is the design of the trust, that the debts and portions should be satisfied out of the lands, and if they cannot be satisfied by the perception of the annual profits, they must be satisfied by the profits of the fee simple. And this must appear by an account taken of the debts and portions to be satisfied out of the estate, and likewise of the annual profits of such estate.

Where trustees may sell.

* Pending the suit.

But

But if such payments be to be made out of the annual profits or rents only, there such payments must be made as they can without sale or mortgage; because the court cannot enlarge the dispositions that persons make of their estates further than the intent of such conveyances. So likewise if the payment had been out of the rents only, the lands could not have been sold by the trustees, because the trustees were confined to the yearly income of the lands. *Lady Coventry's case*, 2 *Mod. Cas.* 12. *Gilb. Eq. Rep.* 160. *Eq. Abr.* 348. p. 19. 2 *Eq. Abr.* 87. p. 9. 660. p. 8. 673. p. 9. 2 *Will. Rep.* 222. *Comyn.* 312. *Max. in Eq. last case.* 1 *Strang.* 596. *Lucas* 463.

Thirdly, Frauds.

VOLUNTARY conveyances are always fraudulent against purchasers, and therefore any person coming in by a voluntary conveyance, and pursuing a purchaser at law, shall be obliged to discover his title in a court of equity; because it is against conscience to proceed to disquiet such purchaser upon a meer voluntary conveyance, and the purchaser has a right to know what dormant titles such volunteer has to set up against him.

A patron presents a clerk to a living, and after institution and induction, requires him to give a bond of resignation, which the incumbent refusing, a third person, to whom a grant of the next avoidance after the death of the late incumbent, was made by the patron,

patron, in trust for himself, brings his * *quare impedit* against the incumbent, and had a verdict and judgment: whereupon the incumbent brings his bill in chancery for an injunction, and upon proof of this whole matter, obtained a perpetual injunction; because it was a fraud to grant the avoidance to overreach the incumbent with whom he had filled the cure.

If a man obtains a bond or covenant by fraud which is not negotiable, there if such covenant or bond be assigned over to a third person for valuable consideration, without notice of the fraud, yet such assignee shall not recover, because the bond or covenant being originally got by fraud, tho' the obligee or covenantee had obtained the solemnities of contracting, yet having obtained them so as they did not bind in a court of conscience, the contract creates there no obligation; and therefore the assignee who had no title at law, because he must sue in the name of the person who committed the fraud, is not intitled to any relief in a court of equity, and the rather, because such assignee might have gone and enquired of the covenantor or obligor, and ought in prudence to have done so, before he took his contract as a security for his money.

Sale of lands.

If a man aliens his lands by a voluntary conveyance, and such conveyancer sells for valuable consideration, the land is for ever bound. For this is not like the former case,

* Why he impedes him; a Writ so called, because the words, *why he impedes him* from presenting, are an emphatical part of the writ.

because

because the alienor does convey an interest, but the solemnities of contracting in the former case being obtained by fraud create no obligation; therefore in the case of land, if the person who comes in by the voluntary conveyance sells to another for valuable consideration, he fixes the interest in such purchaser so as not to be shaken. *Prodgers v. Langham*, *Keb.* 486. *Sid.* 133.

So if *B.* obtains a conveyance of land from *A.* by fraud, and *A.* quits the possession to *B.* and *B.* sells the land to *C.* for valuable consideration * *bona fide*, and without notice, *A.* can never obtain the lands against *C.* because the fraudulent conveyance with the quitting the possession transfers the interest, and then, when *C.* has obtained an interest at law for his money * *bona fide*, a court of equity ought not to take it from him.

If *A.* makes a voluntary conveyance to *B.* and *A.* afterwards conveys for valuable consideration, the valuable consideration shall take place. But if *B.* had first conveyed upon a valuable consideration, then his conveyance should have taken place: and in such cases if both conveyances be voluntary, it lies only on the priority; for *A.* had an interest notwithstanding his voluntary conveyance to convey for valuable consideration, for † *quoad* such person's coming in for value, he had an interest to convey, and *B.* having the legal interest in him could likewise convey, so that the purchaser who first comes into the legal

* Honestly. † As to.

interest upon a just and valuable consideration has the title.

Personal
estate.

As to the personal estate there is a difference between contracts that are negotiable, and such as are not; for a man that has obtained a fraudulent contract that is not negotiable, as a bond or covenant, this, as we said, creates no obligation in a court of equity, and therefore tho' the assignee comes in for value, he obtains nothing. But if a man obtains a negotiable note by fraud, and he actually negotiates it for value, the indorsee of the note shall have his money of the drawer, because he has done a mercantile act, and therefore subjects himself to the mercantile law; and it would be the ruin of all commerce, and a great interruption to it, if the original cause and consideration of such notes should be inquired into, and the indorsee has a legal right to the note, and a legal remedy at law, which a court of equity ought not to take from him. But the assignee of a chose in action has no remedy at law, or a right to sue in his own name, and has only an equitable remedy, and he fails both in law and equity when the bond is obtained by fraud, and so has no right against the original contractor for the money.

Turton v.
Benson, Eq.
Abr. 45. p. 5.
88 E. p. 2.
2 Vern. 764.
Pre. Ch. 522.
Lucas 445.
Peer Will.
496.

But there is another difference in a negotiable contract, and that is, where a negotiable contract is actually negotiated in a mercantile way; there the indorsee shall in all events have his money, because he claims by the mercantile law, and it would put a stop to all commerce if it were otherwise; but where it is not actually negotiated in the mercantile way, as if it were assigned as a collateral

teral security for a debt already contracted, there the indorsee stands in the place of the indorfor, and takes the note, such as it is, to prop and support his own interest to a debt already contracted, and therefore he does not come in, in the mercantile way where the note passes as ready money, since the money was advanced before he had the note; and therefore not coming in in the mercantile way, if the note was fraudulently obtained, or by gaming, he has no remedy against the drawer. ^{2 Strange 1155.} Boyer v. Bampton.

It seems that this should be understood of relief in equity, where the plaintiff had lost the note; and it has been determined that an indorsee * *bona fide* without notice shall recover at law, tho' the winner shall not. *Hussey v. Jacob.* 5 Mod. 175. *Carth.* 356. *Holt* 328. *Cases B. R.* 96. *Salk.* 344. *Comyn.* 4. 1 *Lord Raym.* 87. But see the above case of *Boyer* and *Bampton*, where it was held, That the innocent indorsee could not maintain an action against the drawer, and had only remedy against the Indorfor. 2 *Strange* 1155. where the chief justice took notice, that in the case of *Hussey* and *Jacob*, the point adjudged was mistaken.

There are further differences between negotiable contracts and others: for if a man draws a negotiable note and afterwards comes to pay it to the promisee of the note, and the promisee does not deliver up the note, but pretends to have lost it, having actually before negotiated it, or if he negotiated it afterwards, the drawer must pay this money over again, because he suffered such a nego-

U

tiable

* Honestly.

liable instrument to stand out against him; therefore he trusts to the honour of the promisee and to his covenants if he takes security against it, and contributes, by letting the note lie out against him, to the deceit of the indorsee who has taken it in the way of trade instead of money.

But if a man has bound himself in an obligation, and afterwards comes to pay the money, and the obligee pretending to have lost the bond, receives the money and gives a release, this is a legal discharge to the obligor, and tho' the obligee should either before or afterwards assign such bond, a court of equity would never oblige the obligor to pay it over again, because the obligor has a legal discharge, and there is no equity against him to pay it over again. And here the assignee must take his remedy against the assignor upon his covenants, one of which in the common course of conveyancing generally is, that there is the sum due on the bond or covenant, and that he will not release or discharge it.

So if one of the co-obligors pays the money by a third hand to the obligee, and no release is given, and an assignment of the bond is afterwards made to a third person without notice of the payment, as a collateral security for a debt before contracted, there the other co-obligor shall not pay the debt over again, because the assignor assigned nothing, the money being actually paid when such assignment was made, and consequently the contract dissolved in equity, and the assignee as to the money being due on such contract trusted only to the covenants of the assignor.

But

But if the bond was assigned for value before payment, there an equitable interest passes, and, in such cases if the obligor pays the money to the obligee, and cannot plead such payment at law, a court of equity will not interpose to assist him, for he ought not to profit of his own uncautious payment against a person who comes in on an equitable consideration: and the court of equity cannot injoin in this case, because the obligee proceeds contrary to conscience, in as much as the obligee after assignment is looked upon in a court of equity as a nominal person, and therefore a court of equity ought not to interpose where the assignee is only suing in the name of the obligee in order to recover his just debt.

But if the obligor can plead his payment at law, there it seems a court of equity will not interpose to assist the assignee, for when payment is made without fraud there is no equity that the money should be paid over again, and the assignee, who had no legal interest in the chose in action by his contract, must take his remedy upon his covenants against the assignor.

As to bargains made with heirs where their fathers are tenants for life, the rule seems to be this, that if the heirs have a maintenance from the father, and should take up goods at extravagant rates, the court of equity will in such cases relieve after the death of the father, and reduce the bargain to the common value of the goods, with an allowance of interest from the time of taking them up, because it is an oppressive bargain, and merely to supply the extravagance and prodigality of the heir. *Barney v. Beak*, 2 Chan. Cas. 136.

Bargains made with heirs.
Nott v. Hill,
Eq. Abr. 275.
J. p. 1.
2 Chan. Cas. 120.
Vern. 167.
2 Vern. 27.

And there have been instances where the heir has been relieved, tho' in a former bill exhibited by the creditors, he refused to pay the debt, and swore he would not apply to equity for relief. But if the heir had no maintenance from his father, and was turned out upon unreasonable displeasure taken by the father; there if the bargain be made and not excessively beyond the proportion of such risk, such bargain shall stand, because it is not to supply the luxury and prodigality of the heir, but to keep him from starving, and since the feller would have lost his money in case the heir had died during the life of the father, he ought to have a proportional benefit for such hazard.

Conveyances
by a woman
before mar-
riage.

Howard and
wife v. Hoo-
ker, Eq. Ab.
59. p. 1.
2 Ch. Rep. 81.

If a woman makes any conveyance of her own estate before marriage without the privity of her intended husband, or confesses any judgment or acknowledges any statute to affect her estate, other than such as were upon valuable consideration, they shall not affect the husband: for this is an apparent fraud, and would hinder the dominion of the husband over the wife's estate. *Lance v. Norman*, 2 Ch. Rep. 79. Eq. Abr. 59. p. 2.

Galey. Lindo,
Eq. Abr. 88.
(E) p. 1.
Vern. 475.

Nay they have carried it so far that where a collateral relation gives a portion with a wife, and the wife gives security to pay part of it back again, and the husband dies without issue, and then the wife dies, and the executor of the wife sues in a court of equity to have the security given by the wife delivered up, the court hath decreed it accordingly, because the security was fraudulent, and passed no right to the money, and a security that

that ought not to be made, ought not to be sued; and this cannot be compared to a voluntary conveyance, because there the grantor passes what may be lawfully given, but the wife cannot lawfully give any part of that which was conveyed to the husband, and the court of equity ought to take such resolutions as tend most effectually to the discouragement of such frauds, and therefore they hold that what is dishonest in its creation can never afterwards be made good.

Where a man makes a voluntary conveyance with power of revocation, and afterwards contracts bond or other debts which only bind the person, such creditors suing the debtor to a judgment, shall extend the lands in the hand of the voluntary conveyancer, and make a title in an elegit to the lands in his hands, notwithstanding such voluntary conveyance, by the statute 13 *El. c. 5.* but if it be a debt only upon a note, and the note is reduced to a judgment during the life of the debtor, there the creditor cannot affect the volunteer, because the debt does not bind the heir, but merely the personal assets. Voluntary conveyances.

But if a man purchases of the volunteer with notice of the bond debt, it has been resolved that such bond debt will not affect the purchaser, for the purchaser is to look no farther than his title, and the bond debt is no part of the title till it is placed on the land by the judgment; and if a man had purchased from the first conveyancer with notice of his debts by bonds, the purchaser would not have been obliged to look after the payment of such debts by bond, because they are trusted

upon mere personal security, which the creditors must compel the person to pay, and are no part of the title of the land.

But if it were otherwise, personal security would be turned into real security in a court of equity, and creditors would embrangle the title where they had not taken security upon it, and the volunteer is just in the place of the first conveyancer, and therefore the debts of the first conveyancer shall no more hinder the sale and come upon the purchase money, than if the first conveyancer himself had sold; for when the sale is made by the volunteer, the first conveyancer then sold * *quoad* his creditors, the voluntary conveyance as to them affecting nothing.

Formerly it was held in the court of equity that if a man had made his will and had devised several legacies, and afterwards finding that the personal estate would not answer, had a discourse with his heir touching his intention to charge his real estate with the legacies, but omitted to do it upon the promise of the heir, that he would see them discharged; that in such case a court of equity would have relieved, and brought the charge upon the heir.

Phillips v. St. Clement's parish, Eq. Abr. 404. p. 2. Unless the son confesses such promise.

But now the modern resolutions of the court have been, that no such parol promises shall charge the estate, for if the estate be charged, it must be charged by the will of the testator, and there can be no will without the solemnities required by the statute of frauds and perjuries, and if parol proof of

* As to,

this

this nature be admitted, then wills that are in writing would be changed by evidence that is * *de hors*. And they have now come to a settled rule in a court of equity, that a will in writing can never be altered or changed by any parol proof, for tho' they will read parol proof to fortify any natural construction that rises from the words of the will, yet they never read any parol proof to make any alteration in the will, or addition to it, and if this should be admitted, it would be a charge added merely on the parol proof where there was nothing in the will to ground it; but if the heir confesses the promise, then it should seem that a court of equity will decree it, for then there is no danger of perjury.

So also if a will be obtained by circum-
vention and artifice, yet if the testator was of
† *animus testandi*, the court will never look back
into the cause of procuring the will, for tho'
in deeds, where a man is trepaned by any
false acts to parting with his interest, there
the court will set them aside, because the
grantor parts with nothing, if he had not
a fair intention to pass it, and the grantee gains
nothing by such corrupt artifices, since it is
dishonest to insist upon the solemnities of con-
tracting where they are dishonestly procured:
but in wills they look no further than the
§ *voluntas testatoris*, for no interest passes from
the testator by the will, since it is ambulatory,
till his death, and therefore here a court of
equity looks no farther than whether he was

Rodmin v. Ro-
berts, Sel.
Chan. Cas. 61.

* Externally. † A disposing mind.

§ Will of the testator.

of * *animus testandi* at the time the will was made, and if they should go back to the procuring causes of such wills, they foresaw that it would carry them to consider, whether such wills were made, or legacies given, upon reasonable and just grounds, and if they should go that length with their decrees, the court must determine upon the reason and ground of each bequest, which would shake the appointments that persons make by their wills, and create a general uncertainty in this sort of conveyance of property.

Assignment of
a lease.

Lord Ray-
mond, 320,
322, 368,
554.
2 Lord Ray-
mond, 1551.
Strange 405.
2 Strange
1221.
Swinb. 390.

If a lessee covenants for payment of rent and repairs, or for building on any part of the premises, and the term is afterwards extended and sold for debt, and such assignees finding the term not worth their having, offer to resign to the lessor, and he refusing, they assign to a beggar; and the question was, whether this was a fraud that a court of equity would relieve against. And the court took this distinction, that if the assignees had continued long in possession, and the premises had been worse, and became ruinous under their hands, or by their means; there the assignment would be considered to be a fraud to get rid of the damage that they ought to answer; but if they assigned immediately after their coming into possession, there was no reason to relieve, because the assignee was not chargeable at law, and the lessor had his original security against the lessee and his executors, as he had before, unimpeached, and the assignee being under no obligation to hold it,

* A disposing mind.

there

there was no fraud in making such assignment. *Fitcher v. Tovey*, 2 *Danv.* 485. p. 9.
 4 *Mod.* 71. *Salk.* 81. 2 *Vent.* 234. 3 *Lev.* 295.
Show. 340. *Carth.* 177. *Cases B. R.* 23.
Holt 73.

If a parent or guardian of a minor comes to an agreement with the intended husband upon marriage, that he shall release any part of the money or estate belonging to the infant, such agreement will be set aside in a court of equity, because it is for the sale of the child, and so all brokerage contracts for procuring of marriage with any woman whatsoever are void; and notwithstanding the bond is coloured with the troubles and pains in making the match, yet it is a void contract in a court of equity.

If there be tenant for life, with remainder in tail to the son, and tenant for life lets the lands for a longer term than he has power to make, and the person who takes the lease makes improvements, and the tenant in tail, who is consant of the settlement, stands by, and either encourages, or does not forbid it, the tenant shall enjoy his term; For * *qui tacet, consentire videtur, et qui potest, et debet vetare, et non vetat, jubet.*

A man upon the marriage of his wife's daughter, to whom he was indebted, but not to the value of the portion expected by the intended husband, makes him a verbal promise to pay him four thousand pounds, and pays all but fifteen hundred pounds, and some

Duke Hamilton v. Lord Mohun, Eq. Abr. 90. p. 6.
 2 *Vern.* 652.
Salk. 158.
Lucas 447.
Will. Rep. 118.

Lease made good by a tenant in tail.
Hanning v. Ferrers, Eq. Abr. 356. p. 10.
Gilb. Eq. Rep. 85.
Loffe v. Lowen, Eq. Abr. 156. p. 8.
Gilb. Eq. Rep. 32.
Pre. Ch. 370.
 2 *Eq. Abr.* 256. p. 5.

* Silence is consent, and not forbidding, when a person has it in his power, and ought so to do, is commanding.

time

time afterwards seals a bond to the husband for the fifteen hundred pounds, and shews it, together with his will, to the husband, but does not deliver it, but keeps it by him till his death, and then it is found with his will. He has several creditors upon simple contract, who take out administration, and the husband becoming a bankrupt, his creditors exhibit their bill to have the benefit of the bond: the Lord *Harcourt* decreed that this bond was to be looked upon as a voluntary contract, being not made in pursuance of any obligation in writing on the marriage, nor put into the power of the husband, and therefore it was to be looked upon as fraudulent and void * *quoad* the creditors, even upon simple contract, but good against any legacies; because a voluntary contract in the life of the testator is prior to the will.

East-India

company v.

Clavel, Gilb.

Eq. Rep. 37.

Pre. Ch. 377.

2 Eq. Abr. 52.

p.6.481.p.13.

A man becomes a factor to the *East-India* company, and enters into articles for the due management of their affairs, and likewise gives a bond of two thousand pounds for the performance of the articles. In the articles his executors and administrators are only bound, but in the bond his heirs are taken in. Some few days afterwards, being to go to the *East-Indies*, he makes a settlement of his estate, and limits a term for the raising of five thousand pounds portion for his only daughter, and then departs the Kingdom. A gentleman to whom the daughter shewed the settlement, and who advised with lawyers upon it, afterwards married her, having their opinion that

* As to.

the

the portion was well secured. The lady afterwards dies without issue, and the husband having administered to her, brought his bill for the portion, and had it decreed to him. The *East-India* company, whose goods to the value of twenty-six thousand pounds, were embezzled by the factor, brought their bill to have the said sum out of his real estate; and it was decreed that the real estate should be charged no further than with the sum of two thousand pounds, which was a *lien* upon it by the bond, and * *quoad* the residue, there being no charge upon it, it was subject to the provision made for the daughter, it being fairly made and intended at the time of the factor's going beyond sea. *Clavel v. Littleton, Ch. Pre. 305.*

Notice of the plaintiff's title to the agent or purchaser for another, and likewise notice to the counsel or attorney that peruses the title, is notice to the party himself, because a presumptive notice to the party. *Merrey v. Abney, Eq. Abr. 330. p. 1. Ch. Caf. 38. 2 Freem. 151.*

A decree in a court of equity for money does not bind a purchaser for valuable consideration without notice of the decree, no more than a judgment at law, and is just upon the same footing as a judgment at law; but if it be a decree * *in rem*, there it binds the purchaser, because the vendor conveys no title, since the right of the land is decreed away to another, and therefore the plaintiff has a title by the decree to carry it into execution on the land, into whose ever hands it afterwards comes. *Snelling v. Squib. 2 Ch. Caf. 47. Greswold v. Marsham, 2 Ch. Caf. 170.*

* As to. † Against the estate.

Note;

Searle v. Lano, *Note*; An administrator paid a bond debt
 2 Vern. 88. (without notice) where there was a decree for
 Eq. Abr. 332. a sum of money against the intestate, and ha-
 p. 4. ving no assets he was obliged to pay it out
 2 Freem. 103. of his own pocket.

Fourthly, Powers.

POWERS in any settlement are a reservation of so much dominion over the estate itself which is settled or conveyed. This power being a reservation of so much dominion over the estate, if the party to whom the power is reserved, should convey the estate to any good purposes, as for payment of debts, or for raising younger children's fortunes, tho' the circumstances required by the power are not complied with, yet the court of equity would supply them, because the party having dominion over the estate he may do, as far as his power goes, that which every owner may do with his estate. Indeed he cannot go beyond the power to charge it further, because beyond the power the estate is settled, and therefore so far out of his power; but as far as the compass and extent of his power reaches, so far a court of equity will supply the defect of all circumstances. Because in a court of equity the circumstances are looked upon as guards for the better execution of that power, and to prevent the party that has it from any circumvention or surprise, and the court of equity will see that the

the party is not circumvented or surprized in the execution of such power. And therefore all circumstances that guard it are in that court unnecessary where there are no other persons concerned but those that claim under the power, and those that claim under the settlement; because those that claim under the settlement do likewise claim under the power, and therefore they have the full benefit of the settlement which they contracted for, tho' the power be executed upon them. *Smith v. Ashton, Eq. Abr. 345. p. 14. Rep. Temp. Finch 273. 3 Keble 551. 3 Salk. 277. 2 Freem. 308. Ch. Caf. 264.*

Therefore if the power be to be executed for the payment of debts in the presence of three credible witnesses, and it is executed for the payment of debts in the presence but of two, if there be no conveyance of the land itself, or no person appointed for the execution of the power, there a court of equity will supply it by their decree, and order it to be executed by the person interested in the settlement; because they all claim under that power. But if the power be to be executed by a will in writing, there it must have the circumstances required by the statute of frauds and perjuries to a will in writing, that passes lands, because otherwise it is no will, and therefore cannot charge the lands as a will, since such wills are made void by the statute, and therefore the court of equity cannot break in upon those solemnities. *Bath and Montague, above.*

If there be tenant for life of lands, with remainder to his first and other sons in tail, with power to tenant for life to charge one thousand pounds upon them, by deed executed

Edward v. Slater, Hard. 410. Mongague v. Bath, Sel. Ch. Caf. 55. 2 Ch. Rep. 417. Wilmore v. Kendrick, Ch. Caf. 159.

Where the execution of a power to be made good.

Pit v. Pelham, Eq. Abr. 265. p. 3. Lev. 303. Sir Tho. Jon. 25. Ch. Rep. 283.

ted in the presence of three or more credible witnesses, and tenant for life should mortgage the lands by lease and release for the one thousand pounds to *A.* without any recital of the power in the presence of only two witnesses, the court of equity would compel those claiming under the settlement to supply such defective conveyance, because they claim under the power, and have the whole benefit of their part of the contract, notwithstanding the charge.

Purchasers under a power.

But if tenant for life should in such case mortgage to *B.* reciting the power, and in execution thereof, with all circumstances required by the power, and without notice of the mortgage to *A.* there *B.* would have the legal interest by the use created in the first settlement, and such use would arise at law out of the estate conveyed to the grantee, and therefore will be a legal title to *B.* notwithstanding the conveyance to *A.* and consequently could not prevail in a court of equity, because *B.* had the legal title, and was equally a purchaser for valuable consideration without notice.

But if *B.* had notice of the first mortgage to *A.* then he would come in with an ill conscience into the estate, and *A.*'s mortgage, as prior in time, must prevail.

Again, if such mortgagee had conveyed to *A.* by fine or feoffment, such fine or feoffment would have displaced the remainders, and precluded the mortgagor from the execution of his power, and consequently the subsequent mortgage to *B.* tho' he came in without notice, would be bad at law, since the mortgagor by his fine or

feoffment had conveyed the fee, and had no power to mortgage; but if it were by bargain and sale, or lease and release, that passing by law no more than lawfully may pass, conveys an estate at law in fee to the mortgagee during the life of the mortgagor, and there does not preclude the execution of a power in gross, which is to arise after the death of the mortgagor.

But if it were a power appendant that is to say, a power that is to be executed out of the estate, as a power to make leases for twenty-one years, or the like, there a bargain and sale, or lease and release would hinder the execution of such power, because it conveys away the estate to which such power is annexed. *Jenkins v. Kemish, Hard. 395. Lev. 150, 237. Ch. Cas. 105. Ch. Rep. 275.*

It is held in the above case, that in a marriage settlement not only the husband that is tenant for life, and the issue of the marriage, but a remote remainder man that is not an issue of the marriage, shall be looked upon as a purchaser under the marriage settlement, because all the contractors equally agreed to let in his interest, and the contract is meritorious, and therefore shall stand good to every person interested in the contract.

Brother obliged to provide for a brother, *Pie v. George, Plow. 306. b.* but my Lord *Harcourt* has held, *Eq. Abr. 384. E. p. 1. 2 Salk. 680. Pre. Ch. 308. Peer. Will. 128.* that if in such marriage settlements there were contingent estates to the first and every other son of the marriage, and the trustees should join with the father to destroy their interest before such issue were had, that the court of equity

- equity would set up the settlement against the trustees, and all persons claiming under notice of such contract, because the conveyance was made with an ill conscience to destroy the settlement.
- (a) Tipping v. Pigot, Eq. Abr. 385. p. 2. (a) But if there was a remote contingent remainder, and after the death of the wife without issue, the husband and trustees should join to destroy such contingent remainder, a court of equity would not set it up; because tho' the parties have agreed to let in such interest, yet it is still a contingent interest, and subject to be barred at law, by the husband and trustees joining in a fine and feoffment, and there was no ill conscience in making use of that power, since it disappoints no body that had originally paid price in procuring the contract.
34. Pollard v. Grenville, Ch. Caf. 10. Ch. Rep. 184. Eq. Abr. 342. p. 2. Parry v. Browne, 3 Ch. Rep. 11. Nel. Ch. Rep. 87. Eq. Abr. 342. p. 1. Wilmore v. Kendrick, Ch. Caf. 159. Bath v. Montague, 2 Ch. Rep. 417. Sel. Ch. Caf. 55. So where a rent-charge was granted to trustees in trust for the father and mother for life, and after for the first son and the heirs male of his body, and after marriage and before the birth of the first son, all the parties interested sold part, &c. the trustees were decreed to make it good.
- Orby v. Lord Mohun, Eq. Abr. 343. p. 5. 2 Vern. 531, 542. If there be tenant for life with a remainder in tail, and tenant for life has a power of making leases under certain terms and restrictions, if the tenant for life makes leases for valuable consideration as for money * *bonâ fide* paid, or for valuable rent reserved, or as a provision for younger children; there if all the circumstances of the power are not pursued, the court of equity will relieve, as it does when
- Gilb. Eq. Rep. 45. Pre. Ch. 257. 3 Ch. Rep. 102. 2 Freem. 291. Lucas 473. Pollard v. Grenville, above.
- * Honestly. † For so much.
- any

any other defective conveyance is made; for since the tenant's defective execution of a power for life has a dominion † *in tanto* over the remainder, the not executing the conveyance according to the exact terms of the power, is no more than a defective conveyance; and when a defective conveyance is made upon a good and valuable consideration the court of equity always does relieve. *Parry v. Brown, above, p. 304.*

But if such person makes a voluntary lease, if it be not pursuant to the power, a court of equity will not relieve, because the conveyance being defective and upon no valuable consideration, the court of equity cannot set it up against the person who has the legal estate in him; for he that claims under the power can have no better title in a court of equity than he has at law, since there is no valuable consideration to set it up in a court of equity.

But there are two cases in which a court of *Volunteers* equity will relieve the person who comes in *relieved*. under a voluntary deed by such power.

The first is, when any of the terms of the power become impossible by accident to be executed; for a court of equity relieves against all manner of accidents, since it is unconscionable for the remainder man to take advantage of them; therefore if a man makes a conveyance, with a power of revocation, in the presence of four privy counsellors, and he is sent by the King to *Jamaica*, where that circumstance becomes impossible, there equity will allow him to revoke without it. *Bath and Montague, Sel. Ch. Cas. 55. 2 Ch. Rep. 417.*

X

Secondly

† For so much.

Secondly, where the remainder man gets the deed into his possession and will not allow the tenant for life to have a sight of it, there the tenant for life may execute conveyances, and tho' he does not pursue the terms of the power, yet the court of equity will relieve, because the remainder man shall not take advantage of his own wrong, by with-holding from the tenant for life the sight of his own power.

Fifthly, Wills, Executors, Administrators, Devises and Legacies.

As to WILLS.

Marshalling of
assets.

2 Vern. 182.

Wilson v.

Fielding, Eq.

Abr. 143.

p. 10.

Lucas 426.

THE first thing to be considered is the marshalling the assets. And if there be bond creditors, and creditors by simple contract, and the bond creditors sweep away all the personal assets, as they may to satisfy their debts, for a court of equity cannot narrow their security. Then if the simple contract creditors exhibit their bill against the heir and executors, and the bond creditors, to have them assign the bond, a court of equity will order the bonds to be assigned to a trustee for the use of the simple contract creditors, who may sue the heir at law upon the bonds, in order to recover the value of the money due on the bonds to satisfy the simple contract creditors. *Gower v. Mead*, Pre. Ch. 2.

But

But as to legatees there is a distinction. For if the legacy be upon meritorious considerations, as in satisfaction of a debt, or as provision for younger children or grandchildren, then equity will marshal the assets in the same manner for such legatees as for simple contract creditors. And it hath been said, that if such marshalling of the assets would totally destroy or eat up the estate of the heir, that equity in favour of the heir, will appportion the lands, so as to give both the heir and the legatee a share: which must be in this proportion, *viz.* that the heir must have as much as all the legatees taken together. For since he is not disinherited by the will, the value of what descends to him must be looked upon as his proportion, for the leaving it to descend was as much a designed provision for the eldest son, as the express devise was for the younger children, and therefore he must abate **pro rata* out of his provision in the same manner as each of the younger children are to abate out of their respective provisions, there not being sufficient assets to answer.

For example, if *A.* dies indebted by bond in five hundred pounds, and leaves an estate of two hundred and fifty pounds a year to descend to *B.* his son, subject to that charge, and devises three hundred pounds to *C.* his second son, and two hundred pounds to *D.* his third son, and the bond creditor recovers out of the personal assets his five hundred pounds, *C.* and *D.* the younger sons may exhibit their bills against the heir, executor, and bond creditor, to have an assignment of this

X 2

bond,

* Proportionably.

Nichols v. Chamberlain, 3 Ch. Rep. 89. Nelf. Ch. Rep. 44. Chamberlain v. Chamberlain, Ch. Caf. 257, 258. 2 Eq. Abr. 43. p. 2. 465. P. 4. 2 Freem. 34. 52, 141. Nicholson, v. Sherman, Ch. Caf. 57. Eq. Abr. 237. P. 15. 2 Freem. 181. Hearn v. Merwicke, Eq. Abr. 143. P. 11. 2 Salk. 416. Will. Rep. 201.

bond, and their ratable part of their legacies, and the abatement must be made in this manner, *B.* must have the value of two hundred and fifty pounds out of the land, being his proportion of the **residuum*, and there must be two hundred and fifty pounds more paid to the two younger sons, to be divided in proportion as three to two, because the bond was a charge upon the land, as well as the personal assets, and therefore in equity ought to be paid equally out of each fund, that is to say, two hundred and fifty pounds out of the personal assets, and two hundred and fifty pounds out of the land, which leaves the heir just as much as both the legatees.

But if the provision for the heir be ample, there the whole legacies shall be paid to the younger children. And the provision for the heir is looked upon in a court of equity to be ample, where there is as much left in **residuum* for the heir as is taken out for a provision for all the younger children and legatees, and in such case the legatees shall have their whole legacies.

But if the legatees were volunteers, or collateral relations, for whom the testator was not obliged by the law of God and nature to provide, there is no marshalling the assets in favour of such legatees; for a court of equity never interposes but in favour of persons that have a meritorious consideration.

In like manner if the bond creditor resorts to the land for his debt, and *B.* the heir pays it, and takes an assignment of the bond, and

* Residue.

then endeavours to sue the executors, and load the personal assets with the whole debt, there the court of equity will not suffer him to break in upon the provisions for younger children and legatees, but according to the above-mentioned proportion. But in these cases the heir ought to take care upon payment of the bond to have a legal assignment of the bond, so as to leave a *lien* on the personal assets at law, for otherwise a court of equity has no foundation to relieve the heir. For if the bond stands once as a satisfied bond at law, the personal assets will be only subject to fulfil the will, and therefore in this case the heir must take care to pay, and take an assignment of the bond before judgment be obtained against him on the bond, for * *si transit in rem judicatam* against him, it becomes a *lien* on the land only, and discharges the personal assets.

Anonymous,
2 Ch. Cas. 4.

† *Vice versâ*, if there were no bond creditors in this case, but all the debts were upon simple contract, the simple contract creditors must recover out of the personal assets, and the heir shall hold the land discharged both of the debts and legacies, because there is in this case no foundation for a court of equity to marshal the assets in favour of the legatees, since there is no *lien* upon the land in the hands of the heir where the debts are only standing on the foot of the simple contracts. For the ground that equity goes upon in marshalling the assets, is, where the personal estate, that is satisfaction for creditors and provision for youn-

* If it be a judgment.

† Contrariwise.

ger children, is swallowed up by that which is * *onus* on the heir, there they will marshal the affets. So where the provision of the heir would be swallowed up by the * *onus* on himself, which is also a legal *lien* on the personal affets, there they let him come on the personal affets in the same proportion.

Hearn v. Mer-
wicke, 2 Salk.
416.
Eq. Abr. 143.
p. 11.
Will. Rep.
201.

A. seised in fee and indebted by bonds, gives by his will legacies to his younger children (whom he had otherwise provided for before) and devises his land to his eldest son in tail, whom also he made executor. The eldest son pays the bonds with the personal estate, whereupon the legatees, in the place of the bond creditors, bring their bill against the real estate to be paid out of it, and the bill was dismissed. First, because where there is an exprefs specific legacy of any particular thing they do not commonly break into such specific legacies in favour of the pecuniary ones: But secondly, because the children in this case being provided for in the life time of the testator, their legacies are not upon meritorious consideration, and therefore according to the former rule, being mere volunteers, they are not to induce a charge on the real estate.

How the per-
sonal estate is
to be applied
in case of the
real.

Having considered how affets are to be marshalled, the next thing to be considered is, how the personal estate is to be applied in exoneration of the real.

And in the first place, if a man mortgages his estate and dies, the heir of the mortgagor may demand the benefit of the personal estate after all debts and legacies paid, in exonera-

* Charge.

tion

tion of this mortgage, tho' there were an express devise of the * *residuum* to the executor, and whether there was a covenant in the mortgage for the payment of the money or not; and the reason is, because the personal estate is the fund for the payment of all debts, and the mortgage money is a debt, whether there be a covenant for the payment of it in the mortgage deed or not; because the very borrowing of the money is a debt, and if the money was tendered at the day of the condition, and not accepted, whereby the estate at law was discharged, yet an action of debt might be brought for the money, and since this is a debt, it is like all other debts, to be paid by the executor, and by consequence the devise of the * *residuum* is only after debts paid, which is † *expressio eorum quæ tacite insunt et nihil operatur*, and therefore the executor must pay this debt out of the personal estate before he can be entitled to the residue.

But if there be an express clause to exempt the personal estate from the payment of such debts, or words tantamount, there the load lies upon the heir, because it is the will of him who has the dominion over both estates, that the real estates should be charged in such manner.

If a man mortgages his lands, and devises all his real estate to J. S. or appoints

* Residue. † Expressing what is tacitly implied, and has no effect. See this maxim explained and illustrated in grounds and rudiments of L. and E. p. 114. § Heir made so. || Heir born so.

X 4

him,

Co. Lit. 209.
Cope v. Cope,
Salk. 449.
Eyre v. Hastings, 2 Ch.
Rep. 273.

Hall v. Brooker, Gilb. Eq. Rep. 72.
2 Eq. Abr. 494. p. 8.
504. p. 44.
Gower v. Mead, Pre. Ch. 2.

Gower v. Mead, Pre. Ch. 2.

him to be his heir, the personal estate shall be applied in exonerating of the mortgage, because the § *hæres factus* comes instead of the || *hæres natus* by the will, and it is the intention of the testator that he should have all the privileges of the || *hæres natus*, and to stand in the place of the testator, as his representative in the real estate, and by consequence that the personal estate should discharge all debts due on the real estate as if it had descended to the * *hæres natus*. *Pockley v. Pockley, Eq. Abr. 270. p. 5. Vern. 36. 2 Ch. Cas. 84.*

But if a man mortgages his land and then devises it to J. S. or to A. for life, the remainder in fee to B. there such estate does † *transire cum onere*, for the devisor devises nothing else but the reversion after the charge ceases, and by consequence if the executor were to exonerate, that would be to enlarge the legacy beyond the intent of the testator, and therefore the devise of the real estate, to a particular person, in this manner, does amount to an exemption of the personal estate from this debt, because it is a devise of no more to such a devisee, than what the estate would amount to after such debt is paid; and therefore if a court of equity should decree the executor in this case to exonerate, it would swell the legacy beyond the intention of the testator; so that in such case, if the mortgagee having a covenant on the personal estate, should recover his debt out of it, the executor would have an equity against the devisee to have

* Heir born so.

† Pass with the incumbrance.

the money back again from him. *Cornish v. Mew*, Eq. Abr. 117. p. 2. 315. p. 5. 270. p. 5. *Rep. Temp. Finch* 220. *Ch. Cas.* 271.

If a man devises lands for the payment of debts and legacies, and devises his personal estate to his executor, yet such personal estate shall go in exoneration of the real, because the remainder after the debts and legacies, goes to the heir, and the personal estate is the natural fund for the payment of the debts and legacies; and in this case the devise to the executor seems to be no more than surplusage, since the personal estate would have gone to him without such devise.

Hall v. Brooker, Gilb. Eq. Rep. 72.
2 Eq. Abr. 494. p. 8.
504. p. 44.
Anonymous, 2 Vent. 349, 359.
Stroud v. Ellis, Nelf. Ch. Rep. 203.
Cutler v. Coxiter, 2

Vern. 302. *Mill v. Darrell*, 2 *Vern.* 309. The rule is to make the personal estate subject to the debts, notwithstanding the appointment of an executor. *Ch. Cas.* 297.

But if a man devises lands for the payment of debts and legacies, and the overplus to the heir, or to the heir and a stranger, there the personal estate in the hands of the executor shall never exonerate the real, so devised, as they call it in chancery, out and out; for the overplus is devised in such case as a pecuniary legacy, and not as a real estate; and then the * *quantum* of such pecuniary legacy is to be ascertained in such case, according to the intention of the testator; and that can only be, by taking the debts and legacies out of the price and value of the lands, and therefore it would alter the intention of the testator to cast in the personal estate by way of exoneration.

Wainwright v. Benlowes, Eq. Abr. 271. p. 12.
2 *Vern.* 718.
Gilb. Eq. Rep. 125.
Pre. Ch. 451.

* Quantity.

Hall v. Brooker, Gilb. Eq. Rep. 72.
2 Eq. Abr. 494. p. 8.
504. p. 44. If a man devises lands for the payment of debts and legacies, and then devises the residue of his personal estate to a stranger, and not to the executor, such devise of the * *residuum* must then be taken as a legacy of the personal estate, not before bequeathed to the legatees: and therefore that being considered as a legacy, it cannot go in exoneration of the real estate, since the testator, who had dominion over both estates, had disposed of it.

Middleton v. Middleton, Ch. Rep. 377. So if a man devises lands for the payment of debts and legacies, and devises a specific legacy, or any certain sum of money to the executor, this shall not go in exoneration of the real estate, for the same reason.

Chirton v. Birt, Ch. Pre. 540. If a man devises lands for the payment of his debts and legacies, and devises the residue to J. N. his nephew, at the age of twenty-five, and afterwards devises the residue of his personal estate to J. N. and makes J. S. his executor; the personal estate shall exonerate the real. So that if J. N. dies, the executor or administrator of J. N. shall not have the personal estate, but it shall be applied to the payment of debts and legacies in behalf of the heir of J. N. Because the design of the will was to build up the family in J. N. and his heirs; and that as much of the real estate as was possible should be preserved in J. N. and his heirs; and therefore it must be supposed in a court of equity, that the intention of the testator in devising the residue of the personal estate to J. N. was in order to exonerate the real.

Dolman v. Smith, 2 Vern. 740.
Gilb. Eq. Rep. 128.
Pre. Ch. 456.
2 Eq. Abr. 496. p. 13.

* Residue.

If the grandfather mortgages his lands, and covenants to pay the mortgage-money, and the land descends to the father, and the father dies, leaving a personal estate of his own, it shall not go in exoneration of the mortgage of those lands descended to the grandson, because the personal estate of the father was not liable to the grandfather's debt, and there is no equity that any part of the personal estate should be applied in exoneration of such debt. Whence it seems that if the father had been executor to the grandfather, and the grandfather had left assets to the value of the debt, and the father had converted them to his own use, there so much of the father's personal estate had been liable to the payment of the grandfather's debts; and the grandson could in such case have come upon the father's executors to exonerate the mortgage out of the father's personal estate.

If a man mortgaged his lands by lease and release, with a proviso that if the mortgagor, his heirs or assigns, should pay to the mortgagee, his heirs or assigns, at *Michaelmas* day 1708, or any *Michaelmas* day following, the mortgage money and all the interest, that then the conveyance should cease, and there was no covenant in it for the payment of the money as usual. Here the court took such a conveyance as a condition perpetually attending the land in the hands of the mortgagee, and not as a debt from the mortgagor; for there being no time limited for the payment, it could be no debt from the mortgagor to the mortgagee, since he could never call upon him for the

Cope v. Cope,
Eq. Ab. 269.
P. 2.
2 Salk. 449.
p. 3.

Howel v.
Price, 2 Vern.
701. S. C.
Gilb. Eq. Rep.
106.
Pre. Ch. 423,
477.
Eq. Abr. 270.
p. 7.
Peer. Will.
291.

Goslen v.

Dorney,

Vern. 482.

Lands appropriated for the payment of debts and legacies.

Anonymous,

2 Ch. Caf. 54.

the payment of it, and it being no debt on the mortgagor, his personal estate was ruled not to go in exoneration of it.

The next thing to be considered is, where lands are appointed for the payment of debts and legacies either by the party in his life time, or by his will, in what manner such payments shall be made.

And such debts are to be paid * *in æquali gradu*, both bond creditors and creditors upon simple contracts; and if one of the trustees who is to sell the land is a bond creditor, yet he has no preference to the rest; and the reason is because the lands not being originally a security for the payment of those debts, they become so by the appointment of the owners, but † *cujus est dare, ejus est disponere*; and the owner having appointed them to the payment of all his debts, no one debt which is equally upon a just and equitable consideration, can be preferred before the other; and this as well where the conveyance is by act executed in the person's life time, as by devise; for the devisee was not liable to the bond creditor, though the heir was, but the estate by devise would be totally exempt from creditors, if the trust had not been annexed to it; and the trustee in this case having no *lien* upon the estate by his bond, must take it under the trust, which brings in such trustee and bond creditor * *in æquali gradu* with the rest; and this as

* Equal degree. † The donor may dispose of what he gives as he thinks proper. See this maxim explained and illustrated in Grounds and Rudim. of L. & E. p. 44.

well since the statute of 3d and 4th W. & M. *cb.* 14. *sect.* 4th, as before. For though that statute provides against the voluntary disposition of lands, to the disappointment of bond creditors, who have the *lien* upon the heir, and subjects the devise to the payment of the bond debts; yet there is an exception in that statute as to the disposition of lands for payment of debts and children's portions, which the testator, by contract in his life time, was obliged to pay; and therefore simple contract creditors are * *in æquali gradu* with bond creditors, as they were before the making of that statute.

Before this statute where lands were given for the payment of debts and legacies, the legacies came in equal degree with the debts that were not judgments or a real *lien* upon the lands, because the debts not having an original security upon the lands by the rule of † *cujus est dare, ejus est disponere*, the testator was allowed to bring in the legatees § *in æquali jure* with his bond and simple contract creditors, tho' my Lord *Nottingham* doubted thereof; but now since the statute has taken away the power of making voluntary conveyances in derogation of bonds, the bond creditors are to be preferred to the legatees, but the simple contract creditors remain as they were before in chancery, since the statute has made no alteration as to them. *Wolestoncroft v. Long*, *Chan. Cas.* 32. 3 *Chan. Rep.* 12.

Goslen v. Dorney,
Vern. 482.
Powel's case,
Nelf. Ch. Rep. 202.
Hickson v. Witham, *Cha. Cas.* 248.
Rep. Temp. Finch 295.
Freem. 305.
Whitton v. Lloyd, *Chan. Cas.* 275.
2 Vern. 405.
Anon. S. P. 2 *Ch. Cas.* 54.
Anon. S. P.

* Equal degree. † The donor may dispose of what he gives as he thinks proper. § In equal right.

Therefore

Challis v. Cal-
born, Eq. Abr.
124. p. 13.
325. p. 9.
Gilb. Eq. Rep.
26.
Pre. Ch. 407.
Goslen v.
Dorney,
Vern. 482.

Therefore if a man leaves three hundred pounds debt upon bond, three hundred pounds upon simple contract, and three hundred pounds legacies, and had before the statute devised his lands for the payment of his debts and legacies, and the land devised had been worth six hundred pounds, there would have been two hundred pounds to the payment of the bonds, two hundred pounds to the payment of the simple contract creditors, and two hundred pounds to the payment of the legacies. But now since the statute the whole three hundred pounds must be paid to the bond creditors, which must be subtracted from the legatees, for the bond creditors must have the whole before the legatees can have any thing, and therefore the bond creditors will have the whole three hundred pounds, the simple contract creditors two hundred pounds, as before the statute, since it makes no alteration * *quoad* the dispositions made to them, and the legatees shall have one hundred pounds, since nothing can be disposed to them till the bond creditors have their debts answered, and therefore the one hundred pounds must be taken from the legatees share to answer fully the bond creditors.

Where lands are devised to the executors for the payment of debts, here the trust being declared for the payment of debts, it must be understood for the payment of all the debts, and therefore all the creditors must come † *in æquali gradu*, according to the intention of that trust, tho' *Vernon* doubted.

* As to.

† In equal degree.

But if lands be devised to executors to be sold, or a power devised to them to sell, there the money arising from the sale is assets, and shall be distributed according to the course of administration, and there a bond creditor shall be preferred to a simple contract creditor, because it being only the intention of the testator to make the lands personal assets, equity must follow the intention of the testator, and distribute them in a course of administration.

We must now consider how far the creditor may follow the assets; and it is plain that wherever the executor or administrator disposes of the assets without valuable consideration, there the creditors, or whoever is entitled by the statute of distributions, may follow the assets, for such disposition is fraudulent: and therefore is as if they were in the hands of the executor; and he in whose hands they are being * *particeps criminis*, the creditor has a demand against him.

But if they were sold for valuable consideration, the creditor can never follow them, because it is the province and office of the executor to make money of the assets to the best advantage, and none would buy if a vendee † *bonâ fide* were subject to the demand of creditors; so that the buyer is not to look to the application of the money.

If the husband leaves a wife and children, and leaves one third to his wife, and the rest to the children under age, and the wife marries again, and the second husband before mar-

* Criminally concerned.

† Who was honest.

How far a creditor may follow assets. *Paget v. Hofkins, Gilb. Eq. Rep. 111. Pre. Ch. 431.*

Paget v. Hofkins, above.

riage takes an account of the wife's share, and settles in proportion, yet he will always be subject to the demands of the children; so that if any part of theirs be lost he will be obliged to make it up in proportion to his own share, even after the death of his wife, because he comes in with notice of the infants share, and into an account unliquidated, and which cannot be closed during the infants minority, and therefore he takes the money that is due to his wife under the casualty of what that estate shall be when the infants come of age, for his is an unsettled share during the infants minority.

What debts to
be paid when
one purchases
under a will.
Tompkins v.
Tompkins,
Gilb. Eq. Rep.
90.
Pre. Ch. 397.

If a man devises lands for the payment of his debts in general, the vendee of the estate need not see to the application of the money, but the trustee only; but if it be for the payment of any particular debts, or for the payment of debts in a schedule annexed to the conveyance, there the vendee is obliged to see to the application of the money, because if the trustee sells more than is sufficient to pay the debts, the purchase is not to be affected unless he be guilty of fraud, for the trust is contained in the deed under which he claims, and therefore the payment of the money is to be made in the manner that the deed directs, since that is his title; but where the trust is for the payment of debts in general, there he has no notice of such debts by the trust deed, and therefore is to pay the money into the hands of the trustee, who is to see to the application of it.

But

But if creditors prefer a bill against the trustee, he cannot purchase * *pendente lite* without seeing such creditors discharged, and after notice of a creditor, it is necessary * *pendente lite* to see the money applied, lest there should be a bill preferred against the trustee. But it is not necessary to see it applied unless there be a bill filed; and if a man devises lands for the payment of legacies, there the vendee must see to the discharge of the legacies in the will, because that is likewise part of his title. *Ewer v. Corbet*, 2 *Peer. Will.* 148. 2 *Eq. Abr.* 449. p. 2.

But as to personal goods and leases for years, the vendee † *bona fide* is discharged from seeing to the application, because it is the office of the executor to dispose of them, and it would hinder the executor from sale of the assets, if a creditor, after they were sold § *bona fide*, could put the vendee to trouble.

We come now to consider when a legacy shall be looked upon to be devised in satisfaction of a debt.

AND by the *Justinian* law, if a debtor devised to his creditor the sum due, or any part of it, it was || *inutile legatum*, unless the legacy was far more in quantity, or the

* Pending the suit.

† Honestly so.

§ Honestly.

|| An useless legacy.

Y

debt

debt was to be paid at a time to come, or upon condition, and the legacy was present and absolute; or that there was an easier action for the legacy than the debt. For they looked upon the will as a direction to the heir how the estate † *in toto* was to be disposed of, and therefore a disposition to a man, who was intitled to a part of the estate, was but giving him his own, unless there was any more advantage in the legacy, than in taking it as a debt. *Just. inst. de legatis, lib. 2 tit. 20. sect. 14**. *Vinnius* 437. *Vandywater* 30. *Barth. de legatis* 231. *Sich.* 627. *Cuthbert v. Peacock, Eq. Abr.* 204. p. 8. *Salk.* 155. 2 *Vern.* 593. *Swinb.* 555.

Lechmer v. Blagrove,
Gilb. Eq. Rep.
64.
2 *Eq. Abr.*
350. p. 5.
Cuthbert v. Peacock,
above.

But the canonists have expounded these wills as the civilians did the § *testamenta militaria*, that is to say, according to the intention of the testator. And they looked upon the intention of the testator when he devised the same sum that was owing, to be merely upon a principle of justice in compensation of the debt, and not from a principle of kindness and generosity to the legatee, unless he had expressed himself, that it was over and

* *Si debitor creditori suo, quod debet, legaverit, inutile est legatum, si nihil plus in legato, quam in debito: quia nihil amplius per legatum habet. Quod si in diem, vel sub conditione, debitum ei pure legaverit, utile est legatum propter representationem.*

If a debtor bequeathes to his creditor what he owes him, it is an useless legacy, if the legacy be no more than the debt; because he reaps no benefit from it; but if he had bequeathed him a debt due at a day certain, or upon condition, the legacy would have been valid by reason of the representation, that is, of the legacy's becoming due before the debt. † In general. § Military testaments.

above

above the debt. And this presumption they founded upon the similitude of the sum that was owing, and of what was appointed to be paid by the legacy, which yet might be controled by opposite presumptions. And our resolutions have followed the canonists. And therefore we have resolved, that if a less sum than the debt is devised, that shall not be looked upon as a compensation for the debt, because a less sum cannot be a compensation for a greater; and by consequence it will be a legacy over and above the debt. Goston v. Mill, 2 Vern. 141.

Menochius de præsumptionibus 362, 3, 4, 5, 6. Fre. Ch. 9.

Cranmer's Case, 2 Salk. 508. 2 Eq. Abr. 350.

p. 2.

So if a man gives a legacy, and afterwards happens to contract a debt the same with the legacy, it will not be in satisfaction, because he could not have it in contemplation at the time of making his will, to satisfy a debt not in being; and therefore that could not be the intention of the testator.

A. indebted to *B.* in two hundred pounds, makes his will, and devises five hundred pounds to *B.* this is not a devise of five hundred pounds over and above the two hundred pounds. But the executor may deduct the two hundred pounds, and pay the remainder being three hundred to *A.* See after 336.

A. devises ten pounds annuity to *B.* and makes *C.* executor, *C.* makes *D.* executor, and devises ten pounds annuity to *B.* *D.* afterwards makes a settlement, and secures an annuity of twenty pounds on *B.* adjudged to be in satisfaction of the two annuities of ten

Y 2

pounds

Davison v. Goddard, Gilb. Eq. Rep. 65.
2 Eq. Abr. 61, p. 1. 217. p. 1.
256. p. 3.
351. p. 7.
352. p. 10.
in margin.

pounds, and not a gift. *Crompton v. Sale*,
Eq. Abr. 205. p. 9. 2 *Will. Rep.* 553.

Cuthbert v.

Peacock, Eq.

Ab. 204. p. 8.

2 Vern. 593.

Swinb. 555.

Salk. 155.

Meredith v.

Wynne, Eq.

Abr. 70. p. 15.

Gilb. Eq. Rep.

70.

Pre. Ch. 312.

2 Vern. 448.

Sir John Tal-

bot, v. Duke

of Shrewsbury,

Gilb. Eq.

Rep. 89.

Pre. Ch. 394.

2 Eq. Abr.

352. p. 10.

But if a greater sum be given by way of legacy to the creditor than his debt, it should seem to be in satisfaction of the debt, unless the contrary be proved. Because, though it was said by Chancellor *Harcourt*, that a court of equity shall not tell a person, who gives a legacy, that he pays a debt; yet the reason seems to be stronger on the other side; for the whole will is to be construed according to the intention of the testator, and when the testator gives a sum to the creditor larger than his debt, and the * *residuum* to another, it seems to be the testator's intention, that the legatee in all events was to have no more out of his estate. For the testator knew the legatee to

* Residue.

be

be a creditor, and if he had intended him his debt over and above the legacy, he would have expressed himself to that purpose in his will; and therefore there is no room to cut off any more from the * *residuum*, than according to the expression in the will; for the silence of the testator cannot be presumed in this case to diminish the * *residuum*.

But in these cases the intention of the testator may be explained by proofs; for wherever the meaning of a legacy is explained, upon a conjecture and presumption, there it is supposed to stand indifferent to one sense or other, were it not for such presumptions; and where a will is expounded upon presumptions, they allow of proofs for the exposition of it; for if the sense of the will be so indifferent to two interpretations, the presumptions are to incline the judge to one sense or the other, much more ought proofs to do it, which are better than any presumptions.

But if a legacy were given upon a contingency, which if it should happen, the legacy would take place; in such case, though the contingency does actually happen, and the legacy thereby come due, yet it shall not go in satisfaction of the debt. Because a debt, which is certain, shall not be extinguished by an uncertainty and contingent recompence. For whatsoever is to be a satisfaction of a debt, ought to be so in its creation, and at the very time it is given, which such contingent provision is not; and therefore it cannot be supposed to be the intention of the testator to give

Sir John Talbot, v. the Duke of Shrewsbury, above.

So likewise if the provision had been by deed.

Linghen v. Sowray, Eq. Abr. 175. p. 5. Gilb. Eq. Rep. 91.

Pre. Ch. 400. Peer. Will.

172. 2 Eq. Abr.

553. p. 7.

Lucas 39, 528.

* Residue.

Y 3

such

such a contingent recompence as a satisfaction for a certain demand. This rule will likewise hold if such provision were made by deed.

On a treaty of marriage, articles were entered into, whereby seven hundred pounds, which was the wife's portion, with seven hundred pounds more to be added by the husband, were to be laid out in lands to the use of the husband and wife for life, with the remainder to the issue male and female of that marriage, remainder to the right heirs of the husband, who dies without issue, before any purchase made, pursuant to the articles, having made his will, whereby he devises his personal estate to his wife, and his real estate to his two nephews, one of whom was his heir at law, and then makes his wife executrix, but takes no notice of the fourteen hundred pounds; the nephews bring their bill for the fourteen hundred pounds which they ought to have, as they would have the land, in case the fourteen hundred pounds had been laid out in a purchase; and upon a computation made it appearing that the wife had seven pounds more annually out of the * *residuum* than she would have had out of fourteen hundred pounds, that sum was decreed to the nephew; for it being bound by the articles was in equity a real estate, and the wife was not to have both the * *residuum* and the profits of that real estate during her life, upon the foot of the articles, but was to make her election which she would take; for the * *residuum* is always a sum which

Linghen v.
Sowray,
above.
Kettleby v.
Lamb, 2 Ch.
Rep. 404.

* Residue.

is to be employed for the payment of debts; and in propriety of speech, there is no * *residuum* till after the debts and legacies are paid; and the wife here being a creditor for the sum that was to be laid out in the land to answer her annuity, which debt must be answered out of her * *residuum*, if there be sufficient to answer it, as there was in this case; and if there was not, the whole * *residuum* must be first applied to the discharging of such debt, before any of the specific legacies can be broke in upon.

A man gives his bond to leave his wife five hundred pounds, and dies intestate; and the wife's distributive share comes to five hundred pounds, this is in equity a satisfaction of the bond.

Blandy v. Widmore,
2 Vern. 709.
2 Eq. Abr.
352. p. 11.
Peer. Will.

If a man devises lands for the payment of his debts and legacies, and after payment of debts and legacies, then over to his heir, if the trustees raise the money and imbezzle it, yet the heir shall not have the lands till the debts and legacies be paid. Because they are not devised to him till after the payment of the legacies: and therefore the lands have not borne their burthen till after payment made to the legatees.

324.
When lands devised for payment of debts shall be discharged.
Tomkins v. Tomkins,
Gilb. Eq. Rep.
90.
Pre. Ch. 397.

But if a man devises the rents and profits of his real estate to trustees, or his executors, for the payment of debts and legacies, and at the age of twenty-one years to his heir. There, if the trustees or his executors raise the money and embezzle it, the land however is discharged when the heir comes of age, because the

* Residue.

Y. 4

money

money being to be raised within a definitive time, the land, afterwards, is devised as freely and gratuitously to the heir, as the profits of it were devised within the definite time to the payment of debts and legacies; and therefore, having once borne its burthen, is for ever discharged.

Salk. 153.

So if the devise be, that the money should be raised out of the lands by trustees, for the payment of legacies, and afterwards the lands are devised over, and the trustees raise the money, and embezzle it, there the land hath borne its burthen; because by the interest of the devise, the money is to be raised only, and then to be entrusted with the trustees, and therefore the land shall afterwards go to those to whom it is devised over.

But if the land be devised over, after the raising and payment of the money to legatees, there the land hath not borne its burthen, till after actual payment.

Masters v.

Masters, 2 Eq.

Abr. 322. p.

13. 352. p. 12.

554. p. 10.

Will. Rep.

421.

If a man devises specific legacies and pecuniary legacies, and the estate falls short to answer the pecuniary legacies, they shall abate in proportion: but nothing shall be abated from the specific legatees; because the specific legacy transfers the dominion of the thing itself, and therefore is no part of the personal estate, to answer what is charged upon it by the testator. *Sayer v. Sayer*, Eq. Abr. 200. p. 9. 298. p. 1. 2 *Vern.* 688. *Gilb. Eq. Rep.* 87. 2 *Eq. Abr.* 553. p. 6. *Pre. Ch.* 392.

So if he devises all his personal estate in *Dale*, and devises a pecuniary legacy, and has another personal estate, sufficient to answer it, the pecuniary legacy shall go out of such personal

personal estate and the specific legacy at *Dale* shall not be touched, though they were not enough out of the other personal estate, to answer such pecuniary legacy; because the bequest of the personal estate at *Dale* is as if he had enumerated all the particulars there, and transferred the ownership of them. But if he had said that such pecuniary legacy should come out of all his personal estate or words tantamount, there such pecuniary legacy, in case of a deficiency in the other part of the personal estate, shall come out of that specifically devised.

So if a man devises his personal estate at *Dale* to *A.* and his personal estate to *B.* and devises a pecuniary legacy to *C.* such pecuniary legacy shall come out of both, if there is no other personal estate; because it must be supposed he intended to subject both to that legacy, otherwise he must mock the legatee.

If a legacy be left to a man of full age, the executors shall answer interest after the year from the testator's death, from the time that it is demanded by the legatee; because it is a deposit in the hands of the executors for the benefit of the legatee, and that deposit must be answered upon demand. Kap v. Powel.
Pre. Ch. 11.
2 Eq. Abr.
564. p. 2.

But if it be a legacy to infants, there it shall be answered with interest, from one year after the death of the testator, because the executor is considered as a trustee, who ought to act for the benefit of the infant, and who ought to put out his legacy under the decree of the court. Ratcliff v.
Graves, Eq.
Abr. 93 (K)
p. 3.
Vern. 196.
2 Ch. Caf. 152.
Smell v. Dee,
2 Salk. 415.
Eq. Abr. 295.

A p. 5.

A legacy left to infants to be paid when they come of age bears no interest till the time of payment, unless the executor weakens the security, and there he is chargeable with interest. Where the legatee is not to be found, there the legacy shall not bear interest.

If a father devises portions to his children, payable when they come of age, and makes no provision for their maintenance, they shall have interest in the * *interim*; because the father was obliged to maintain them, if he had lived. † *Aliter*, if a stranger had made the devise; because he was not obliged to maintain them. *Attorney General v. Thompson, Eq. Abr. 301. p. 2. Pre. Ch. 337.*

But if more profit be made than the common interest, no more shall be answered to the infant than such interest, because the executor ran the hazard at his peril.

But if a legacy be devised to a man of full age, § *solvendum in futuro*, at a day certain, there the executor shall answer interest from that day; because it is the will of the testator, that then it should be tendered by the executor to the legatee; and as he has the benefit of the delay of the payment, so he must have the burthen of the interest, if it be not then paid.

Atkins v.

Dawbeny,

Eq. Abr. 46.

p. 9.

Gilb. Eq. Rep.
88.

If a man gives a present legacy, and charges it upon a reversion, expectant upon an estate for life, such legacy shall carry interest from the death of the testator; for being not char-

* Mean time.
paid hereafter.

† Otherwise.

§ To be

ged

ged on the personal estate, the executor cannot be allowed the usual year for collection of assets, and it is an immediate burthen upon the reversion itself, and therefore must carry immediate interest; for if the testator had intended otherwise, he would have raised the charge after the determination of the estate for life; and there is no reason to oblige the legatee to demand it, since such demand would be fruitless, the legacy not being in the hands of the executor, but only charged on the reversion.

The court of equity will never allow a father or mother to receive legacies bequeathed to their children though they are guardians by nature to them, and have decreed the executors to pay the legacies over again, which they had formerly paid to such parents, even after an acquiescence of an infant, after his full age, upon the promise of the parents to pay the legacy; for the filial duty shall not destroy the right of the child. *Dawley v. Ballfrey*, *Gilb. Eq. Rep.* 103. *Will. Rep.* 285. Doyly v. Tol-
ferry, Eq. Abr.
300. p. 2.
Palmer v. Tre-
ver, Eq. Abr.
58. p. 6.
Vern. 261.

If an executor pays a legacy in his own wrong, where the personal estate will not answer, he shall make the legatee refund, because the legatee takes the legacy under the trust, and therefore it is, that the legatee does not give security.

Where a man devises several legacies and makes no disposition of the **residuum*, and after acquires a very considerable personal estate, and does not alter the will, he does not die intestate as to the new acquisitions, but the

* Residue.

executors shall distribute them to the legatees proportionably.

Cordell v.

Noden, Eq.

Abr. 244. p. 5.

2 Vern. 148.

Pre. Ch. 12.

Trott v. Ver-

non, Eq. Abr.

198. p. 6.

2 Vern. 708.

Gilb. Eq. Rep.

111. Pre. Ch. 430. 2 Eq. Abr. 291. p. 10.

If a man devises that his debts, legacies, and funeral expences, shall be paid in the first place, and then proceeds to dispose of his real and personal estate, if the personal estate falls short, the real estate shall be subject to the payment of debts, legacies, and funeral expences: because that is the charge in the first place whatever comes after.

Goston v.

Mill, 2 Vern.

144.

Pre. Ch. 9.

Salk. 154.

Anon.

If a man owes a sum of six hundred pounds, and devises four hundred pounds in full satisfaction of all the creditor can claim, and then devises his lands for the payment of his debts, and the creditor proves six hundred pounds due, tho' the debt was barred by the statute of limitations, yet it shall be paid out of the lands, because the legacy cannot be a satisfaction for a greater sum, and it remains a debt, notwithstanding the statute: and therefore the devise, being for the payment of debts, it is in trust for this debt, as well as other debts.

Palmer v.

Trevor, Eq.

Abr. 58. p. 6.

Vern. 261.

If a legacy be devised to a * *feme covert*, who lives separately from her husband and is not maintained by him, yet it shall not be taken to be for her separate use, unless it be so expressed in the will: and in such case, if payment be made to the wife it is ill, and it shall be paid over again to the husband; because her living separately from her husband

* Married woman.

does

does not destroy the legal right of the husband.

A man devises the * *residuum* of his personal estate to his cousin *A.* and *B.* her sister, and his cousin *C.* and *D.* his wife, equally to be divided between them, it was decreed that the husband and wife should carry off a third part only, because there could be no division between husband and wife, and therefore there would be no equal division among them all, and the wife's name is put in to make a survivorship to her of the part bequeathed to the husband.

Residuum.
Bricker, v.
Whalley,
Vern. 233.

A man devises to *J. S. Black* acre, which was in mortgage, or the value thereof, this was decreed a devise in fee, and that if the executor had assets sufficient to pay off that mortgage and other debts, that *Black* acre should come clear to the devisee. For devising the value thereof, was an intention that so much should come out of the testator's personal estate in case the mortgage was foreclosed, and by consequence so much shall come out of the personal estate as will redeem it.

A man devises the * *residuum* of his personal estate to *A.* for the use of his only son *B.* and his heirs lawfully descended from his body, and for the use of the issue male and female of the bodies of his sisters (and names them) in case his son should die in his minority, without issue of his body lawfully descended, and then appoints his son executor, and afterwards appoints *A.* executor during the minority of

Whitmore v.
Craven, 2 Ch.
Rep. 382.
2 Vent. 367.
Vern. 326,
347.
2 Ch. Caf.
167.

* *Residue.*

his

his son. The son died without issue above the age of eighteen, and under nineteen years of age, and had never taken upon him the executorship, but a little before his death made his will, and bequeathed all to his wife: and the question was whether she or the children of the sister should have the * *residuum*, and decreed for the wife. Because that when the personal estate is devised to a man, and if he dies without issue, during the minority, then over, it must be understood the minority of the civil law, by which such estates are governed, for if he arrives to the full age by that law, he may dispose of his personal estate, and it was the intention of the testator, that when the devisee should arrive at the age in which he might dispose of it, that the contingency should fall off, and such disposing age as to the personal estate is that of fourteen years.

A man possessed of a term for ninety-nine years, determinable upon the life of *A.* devises a rent out of it to *B.* without limiting any estate, the only question was whether if *B.* died during the term, the rent should determine, or whether it should continue during the term; and decreed it should last during the term. Because the devisor having but a chattel interest, he could not create a freehold rent out of it; and since the devise of the term to *A.* would have carried the whole term to him, and not an interest during his life only, therefore a devise of the rent which is in nature of

* Residue.

a devise of part of that interest, shall carry that rent during the whole term.

If a man leaves a * *feme* executrix, and she commits † *devastavit*, and afterwards marries and dies, the husband is not answerable for that † *devastavit* of the wife, tho' he had a fortune with her § *aliunde*, for the † *devastavit* is only a debt to the assets, and the husband is only answerable for the debts of the wife during the coverture, while she is only one person in law with him, and not afterwards. But it must be recovered against her executors and administrators, and the portion of the wife which arises § *aliunde* must be operated during the coverture, or else the law gives it to the husband upon the marriage, for the husband is only answerable for the debts of the wife as he is for the injuries, which she does, which is only during the coverture, and afterwards her representatives must answer.

Where the baron is answerable for the wife, and where not.

But if the husband after the coverture receives any of the goods and chattels of the testator || *in specie*, or any money of his arising out of his effects, and embezzle them, he shall answer for such embezzlements, because it is his own act; for whatsoever is done with the goods of the testator during the coverture is the act of the second husband, for which he is responsible.

Paget v. Hopkins, Gilb. Eq. Rep. 111. Pre. Ch. 431.

So also if he has money or goods of the testator's in his hands after the coverture, he is answerable for them as executor ** *de son tort*, and by consequence in such cases he is to be

* Woman. † Waste. § Otherways. || Specifically.

** Of his own wrong.

decreed to answer for all the personal estate of the testator, which he or his wife hath received during the coverture, for whatever operates the assets operates such assets as he received during the coverture.

Satisfaction.
See 323.

If *A.* owes *B.* two hundred pounds, and *B.* devises to *A.* five hundred pounds, and the residue of the estate to *C.* this is not a devise of five hundred pounds over and above the debt, because *A.* would have then in effect seven hundred pounds, whereas *B.* intended him but five hundred pounds, which would be contrary to the intention of the testator.

Devises.
Chamberlain
v. Chamberlain, Ch. Caf.
257, 258.
2 Eq. Abr.
43. p. 2. 465.
P. 4.
2 Freem. 34,
52, 141.
Davenish v.
Baines, Pre.
Ch. 4.
2 Eq. Abr.
43. P. 4.

A father by his will leaves portions to his younger children out of his personal estate, and devises his real estate to his eldest son for life, with remainders over, and afterwards finding that his personal estate would not answer their portions, acquaints his said son with it, and with his intention of altering his will, and laying the portions on the real estate, to make up the deficiency of his personal estate, which the son dissuades him from, and promises to see the portions paid. If the son confesses such promise in his answer, the court will operate him with the portions, as far as the real and personal estate will go, because he has made that promise, and has a consideration for being just to his undertaking, and there is no fear of fraud or perjury in this case where the promise is confessed; but if he denies it, it cannot be proved, for that would be to overturn the will by parol proof only.

If a legacy is given to a woman on condition she marries with the consent of the executor: when she comes to the age of twenty-one, the condition is discharged, and she is intitled to the legacy forthwith; for the law then looks upon her as a person capable of disposing of herself.

Restraint on Marriage without a devise over.
2 Peer. Will. 528, 531.
3 Peer. Will. 238, 239.

Upon a marriage settlement it was agreed, that if there were no sons, and but one daughter only, she should have eight thousand pounds, if two daughters they should have twelve thousand pounds, if three daughters twenty thousand pounds to be equally divided between them; and there were three daughters, but one died, and decreed that the two surviving daughters should have ten thousand pounds a-piece, to wit, their own part and their sister's upon distribution, because the sister's part was vested, and therefore must come to the surviving sisters, as next of kin upon the statute of distribution.

A man voluntarily charged his estate in *S. Reeve v. Reeve*, with three thousand pounds for his daughter by a first venter, and afterwards settled that estate on a second wife for her jointure; afterwards taking notice of this charge, by his will, and that his wife's jointure might not be incumbered by it, desires that his wife should have her election to refuse that jointure, and take another estate of his in *Y.* instead of it. The wife refuses the estate in *Y.* and the daughter brings her bill, and has *Y.* estate made liable to her portion. And the reason is, that when the *Y.* estate was devised to the wife to exonerate her jointure, it is the manifest intent of the testator that the wife should have her full jointure,

Z

jointure,

Distribution.

S. Reeve v. Reeve,
2 Vent. 363.
Eq. Abr. 221.
P. 3.
335. p. 1.
Vern. 219.
2 Eq. Abr. 719. p. 1.

jointure, and the incumbrance upon the estate in *S.* have its effect: therefore when the wife, who is a purchaser for value, refuses the jointure in *X.* and thereby defeats the incumbrance on the other estate as she may, the intention of the testator must be fulfilled by giving the incumbrances satisfaction out of the *X.* estate, because such devise amounts to a charge of that incumbrance upon the *X.* estate; for the wife's refusing shall not defeat the incumbrance, since the husband has devised the *X.* estate that it might have its effect, and more especially since it is a provision for a daughter whom by the law of nature he is obliged to provide for.

Claxton v.

Claxton, Eq.

Abr. 400. p. 7.

2 Vern. 152.

Pre. Ch. 15.

A man having made a jointure on his wife of certain lands, afterwards devises them to *A.* in fee upon condition he paid several sums to several persons at certain days, and if he failed in such payments, then over to *B.* and his heirs on like terms and days. The money being near due, and *A.* not having ready money, and being afraid of losing his estate, brought his bill against the jointress and those who were to come in upon his default, to have liberty to sell timber off the estate to pay the money; and it was so decreed without any difficulty; for if the jointure was made without impeachment of waste, the timber belonged to him.

Grimstone v.

Lord Bruce,

Eq. Abr. 108.

p. 4.

Salk. 156.

2 Vern. 594.

A. devised his lands to *B.* in fee, conditioned to pay twenty thousand pounds to his heir at law by several instalments, *B.* failed in his payments, and the heir thereupon taking advantage of the condition entered, and *A.* brought his bill to be relieved against the rigour

gour of the condition, and he was relieved upon the terms of paying interest for each particular sum from the time it became due. For wherever there is a condition broken for which a compensation can be made, a court of equity will relieve against the forfeiture, because the forfeiture is a penalty which is the subject matter of relief.

A man seised of a copyhold of the nature of Gravelkind, and a considerable personal estate, makes his will, and thereby devises several sums of money to several of his children as a provision for them, and charged his copyhold and also his personal estate with the payment of his debts and legacies; but the copyhold not being surrendered to the use of his will, one of the younger sons resolved to take advantage of it, and so brought his bill to have his entire legacy out of the personal estate, which would in a great measure have frustrated the provision for the younger children; but the court would not decree him his legacy unless he would surrender his right in the copyhold, and agree to have it charged according to the will, which he accordingly agreed to. For the copyhold being part of the fund, and he consenting to make it liable, it must go in average with the rest of the assets: but if he had not consented, it seems a court of equity would have made it good as a defective conveyance, if the personal estate had fallen short to answer; and if the personal estate had been just sufficient, the daughter must have taken as much out of it, as was to the value of the copy-

Bradley v.
Bradley,
2 Vern. 163.

hold, and then the male children would have taken the copyhold as part of their shares.

A man by his will devises his lands of inheritance to his heir at law, who was his brother, in fee, and then devises ten pounds to *A.* to be paid by his executor within five years next after his decease, and two hundred pounds to *B.* to be paid by his executor within five years next after his decease, and then appoints his heir at law his sole executor, desiring him to see his will performed according to the trust and confidence he reposed in him. The personal estate falling short to answer the legacies, the question was whether they should be charged on the real estate; and decreed they should, because it appears plainly on the face of the will, that the testator intended the lands should be charged by devising them to his heir, and by desiring him to see his will performed.

Attorney General, v. Baxter, Eq. Abr. 96. p. 9.
Vern. 248.
2 Vern. 105.
Duke on charitable uses 84, 110.

* Wherever any thing is given to a charity, and no charity appointed, or if the charity which is appointed be superstitious, there the king appoints, and in a case of a superstitious use the appointment shall be to a charitable use † *ejusdem generis*. Tenant in tail may dispose of a charity out of his lands without fine or recovery, or even by will by virtue of the construction that has been made on the 43 *Eliz. c. 4.* But if a man disposes of a charity by will, and such will wants the necessary circumstances required by the statute

* See stat. 9 Geo. 2. c. 36. concerning devises to charitable uses.

† Of the same nature.

of frauds and perjuries, it shall not operate as an appointment. *Gilb. Eq. Rep.* 44.

If a nuncupative bequest not reduced into writing according to the statute, be confessed in the answer of the executor, it shall be paid out of his * *residuum*, because in such case there is no danger of perjury. *Jones v. Nabbe, Eq. Abr.* 404.p.3. *Gilb. Eq. Rep.* 146.

Twenty pounds is devised to a boy to bind him apprentice, and he dies before he is bound, his administrator or executor shall have it; because the sum is actually devised to him, and the act of God shall not take it out of him. *Barlow v. Grant, Vern.* 255. *2 Freem.* 89.

If there be an executor in trust for infants who is impowered to lay out the personal estate in such manner as he shall think most for their advantage, and accordingly he places out one hundred pounds of the said personal estate in the hands of a person who is allowed to be good security for such a sum at the time of lending, and takes his bond for the money, and the borrower proves afterwards insolvent, the executor shall answer for the sum lent, being lent without the decree of the court. This is the present doctrine, because the court is reckoned to be the universal guardian of infants, and the money is put out without consulting with their † *curator*. *Terry v. Terry, Gilb. Eq. Rep.* 10. *Pre. Ch.* 273.

But quere whether this should not take another turn, lest persons should be discouraged from being executors or trustees for infants; viz. if the sum put out be put out with common prudence, and as carefully as the executor or trustee would put out his own

* Residue.

† Guardian.

money, and without any præmium to arise to such executor or trustee, or if the sum be so small that they could not apply to the court without swallowing up the greatest part of it, that there it shall be allowed in account to the executor or trustee in case of insolvency; but if the executor or trustee fail in any of those circumstances, then they themselves run the hazard of the money if it be lost.

If an executor or trustee lays out the money at interest, he shall have the benefit of it, because he runs the risk, if he were solvent at the time of lending, but if he were insolvent, then the *cestuique trust* shall have it, because he was to bear the loss. *Bromfield v. Wytherley*, *Eq. Abr.* 239. p. 24. 398. p. 7. *Pre. Chan.* 505.

Donatio causa
Mortis.

Jones v. Selby,
Pre. Ch. 300.
2 *Eq. Abr.*
573. p. 2.

If there be a * *donatio causa mortis*, which is a gift † *in præsentis*, to take effect after the donor's death, if the donor dies, the donee has the interest; but if the donee dies before the donor, it reverts to the donor. But if such donation be of money, and there be a written will made subsequent to such donation, which gives the same or a greater sum, it will go in satisfaction of such gift.

Bird v. Hooper, *Pre. Ch.*
298.

If a merchant gives several legacies to his children, and afterwards finding his estate to fall short, deducts several sums out of his younger children's legacies, without touching the eldest son's: the entry in his books which makes the eldest son debtor for such sums wherewith he was set out in trade shall not be deducted out of his legacy, for such

* Gift by reason of death.

† Immediately.

entries were made in the merchant's books that he might take a survey of his whole estate, and not to make deductions or alter dispositions to his children.

If an executor pays a legacy, and the assets fall short, the legatees shall refund, because such legatee has more than his share of the assets in proportion to his legacy.

So if an executor after the death of his testator wastes part of the assets, the deficiency shall fall upon the whole, and the legatees must abate in proportion; for it was the testator who appointed such an unjust and improvident trustee, and so the deficiency happened by the means of the testator, and therefore it must be supposed the design of the testator was, that such deficiency should fall in proportion to the legacies given.

But if one of the legatees recover his whole legacy before the waste committed, the whole loss occasioned by the deficiency shall fall on the other legatees, because it was their own default that they did not likewise recover their legacies in time.

If a man marries a woman who has several debts owing to her, and makes a settlement in proportion to such debts, and dies indebted to others before he had collected in his wife's debts, it seems that if the settlement be made in consideration of the marriage only, the law of survivorship shall take place in relation to the debts due to the wife; because by the law they are after the death of the husband no part of his personal estate; but if the marriage settlement was in consideration of such debts, or if such debts were assigned

Rogers, v.
Bamfield,
Rep. Temp.
Finch 67, 460.
Groves v.
Banson, Ch.
Cas. 148.

by the settlement, then it seems they become part of the husband's personal estate, and shall not upon his death survive to his wife, because he became a purchaser of them by his settlement, and therefore the property of them is altered in a court of equity, and they are no longer debts due to the wife. *Lister v. Lister*, 2 *Freem.* 10. *Eq. Abr.* 6. p. 9. *Rep. Temp. Finch* 285. 2 *Vern.* 68.

Nuncupative will.

Pringe v. Pringe, 2 *Vern.* 99.

If a man makes his will, and a person takes the legacies from the mouth of the testator, with only initial letters for the names of the legatees, these will not be good bequests as on a will in writing, and therefore unless the solemnities required by the statute of frauds and perjuries to make a nuncupative will be observed, they are void; because the bequests cannot be made out but by the parol depositions of the witnesses; for as it is not substantive in the writing it is unintelligible, and therefore such a will is not a written will, but a nuncupative will only; and by consequence without the circumstances required by the statute to a nuncupative will, it is void.

Paraphernalia.

The paraphernalia of the wife shall not go in exoneration of a debt affecting the heir; for it is the necessary apparel of the wife, which the law gives her, and there is no equity in such case to alter the law in case of the heir. *Middleton v. Middleton*, *Chan. Rep.* 377.

Separate

maintenance.

Gold v. Rutland, *Eq. Abr.* 346. p. 18.

If a separate maintenance be made before marriage, or in pursuance of articles entered into before marriage, whatever is bought by such separate maintenance money, as also all the

the money itself placed at interest, or in the hands of the wife, will be protected in a court of equity from the creditors of the husband. But the wife must prove that the money itself was raised out of the separate maintenance, and that the goods were likewise bought with such money: otherwise according to the law, all that is the wife's belongs to the husband. *Willson v. Pack*, *Pre. Ch.* 295, 297. 2 *Eq. Abr.*

155. p. 2.

Where there is a trust of a term assigned to Ratcliffe v. protect an inheritance, a court of equity will Graves, Eq. always govern that trust, so as to carry it to Abr. 93. (K) him that has the inheritance, unless the per- P. 3. son who has both the trust and inheritance by Vern. 196. particular words or expression in his will does 2 Ch. Cas. 152. alter or change it. If he does, since he has Chapman v. the dominion both of the trust and inheritance, Bond, Eq. Abr. 241. p. 2. Vern. 188. he may disannex it. For as he might carve a term out of his inheritance, and devise such term to any purpose, as to legatees, or for the payment of debts, or the like, so he may dispose of the trust of this term, which was originally carved out of the inheritance to the Tyffin v. Tyf- like purposes; but if he does not, the trust of fin, Eq. Abr. the term always goes along with the inheri- 241. p. 1. 274. tance to whomsoever it descends, because this P. 8. term was originally assigned only to protect 2 Ch. Cas. 49, the inheritance from mean incumbrances, and 55. Vern. 1. therefore the court of equity has no power to 2 Eq. Abr. make use of the term to any other purpose, 275, p. 2. or to disannex it from the inheritance to which 2 Freem. 66. it was annexed by the consent of all parties, who had the dominion over it. *Bladen v.* Hard. 489. *Lord Pembroke*, 2 *Vern.* 52. *Nels. Ch. Rep.* 2 *Vern.* 520. 164. *Pre. Ch.* 253.

And

And therefore where a man purchased an estate, and assigned a term to protect the inheritance, and died, leaving a son by one venter, and daughters by another venter, and the son entered and died without issue, and a remote collateral relation who was heir at law to the son, brought his ejectment for the recovery of the inheritance, and came into chancery, and desired that the temporary bar of those terms should be removed out of the way. It was thought in so hard a case, where there were immediate descendants from the purchaser, that the term should be removed. For though it was argued, that a court of equity should not assist, but leave the heir to recover at law as he could, and that equity was to stand neuter where a remote heir came in to strip the children of the purchaser of the inheritance; yet, when they considered on the other side, that if such resolutions should take place, that all the rules of descent would be in the breast of the chancellor, since he could let loose or chain down those terms as he pleased, and that would make a different rule of property in equity from that of the law of the land: they held, that these terms ought in no case to be set up where the dispute at law was, who was heir; for the trust of the term is for the heir, and therefore such terms ought not to be militant against him; and by consequence, the court of equity, if it let the term loose against the heir, would act contrary to the design of that trust, which was originally created for the defence of the heir, and therefore in such disputes the term must always be set aside, tho' the

the question should be upon a law of descents, which the court might not think in itself reasonable. And in this case the person who makes himself heir, according to the course of descents, is intitled to have the term assigned to him in a court of equity.

But if a man purchases an inheritance in the name of trustees, and takes a mortgaged term carved out of such inheritance in his own name, in order to protect the inheritance, such term will be liable to the payment of his debts as well as his other chattles; because the legal interest of such term being in him, it goes as a chattle to his executors or administrators in the same course with his other chattles, and therefore since the law will take hold of it for the payment of debts, or the performance of the testator's will, a court of equity will not interpose to hinder it, for tho' the trust created at the time when it was assigned, annexed it to the inheritance of the trustee, yet it did not take the legal interest out of the owner, and therefore it remains as a chattle in him,

The first letter of the alphabet is A, which is pronounced like the letter A in the word cat. The second letter is B, pronounced like the letter B in the word bat. The third letter is C, pronounced like the letter C in the word cat. The fourth letter is D, pronounced like the letter D in the word day. The fifth letter is E, pronounced like the letter E in the word eat. The sixth letter is F, pronounced like the letter F in the word fat. The seventh letter is G, pronounced like the letter G in the word goat. The eighth letter is H, pronounced like the letter H in the word hat. The ninth letter is I, pronounced like the letter I in the word it. The tenth letter is J, pronounced like the letter J in the word jet. The eleventh letter is K, pronounced like the letter K in the word kick. The twelfth letter is L, pronounced like the letter L in the word let. The thirteenth letter is M, pronounced like the letter M in the word man. The fourteenth letter is N, pronounced like the letter N in the word net. The fifteenth letter is O, pronounced like the letter O in the word out. The sixteenth letter is P, pronounced like the letter P in the word pen. The seventeenth letter is Q, pronounced like the letter Q in the word quit. The eighteenth letter is R, pronounced like the letter R in the word rat. The nineteenth letter is S, pronounced like the letter S in the word sit. The twentieth letter is T, pronounced like the letter T in the word top. The twenty-first letter is U, pronounced like the letter U in the word up. The twenty-second letter is V, pronounced like the letter V in the word vet. The twenty-third letter is W, pronounced like the letter W in the word wet. The twenty-fourth letter is X, pronounced like the letter X in the word box. The twenty-fifth letter is Y, pronounced like the letter Y in the word yes. The twenty-sixth letter is Z, pronounced like the letter Z in the word zoo.

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